CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 37 **AUGUST 27, 2003** **NO. 35**

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Bureau of Customs and Border Protection

(CBP Dec. 03–17)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JULY, 2003

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in CBP Dec. 03–03 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): July 4, 2003

None

Dated: August 11, 2003

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(CBP Dec. 03–18)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JULY, 2003

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): July 4, 2003

European Union euro:

July 01, 2003	$1.158000
July 02, 2003	1.152400

FOREIGN CURRENCIES—Variances from quarterly rates for July 2003 continued):

European Union euro: (continued):

July 03, 2003	1.150300
July 04, 2003	1.150300
July 05, 2003	1.150300
July 06, 2003	1.150300
July 07, 2003	1.134100
July 08, 2003	1.126500
July 09, 2003	1.131100
July 10, 2003	1.139000
July 11, 2003	1.130400
July 12, 2003	1.130400
July 13, 2003	1.130400
July 14, 2003	1.129800
July 15, 2003	1.123300
July 16, 2003	1.120900
July 17, 2003	1.116400
July 18, 2003	1.123900
July 19, 2003	1.123900
July 20, 2003	1.123900
July 21, 2003	1.134600
July 22, 2003	1.132500
July 23, 2003	1.148400
July 24, 2003	1.144100
July 25, 2003	1.151300
July 26, 2003	1.151300
July 27, 2003	1.151300
July 28, 2003	1.149700
July 29, 2003	1.146600
July 30, 2003	1.136700
July 31, 2003	1.123100

South Korea won:

July 01, 2003	$0.000839
July 02, 2003	.000842
July 03, 2003	.000845
July 04, 2003	.000845
July 05, 2003	.000845
July 06, 2003	.000845
July 07, 2003	.000846
July 08, 2003	.000847
July 09, 2003	.000848
July 10, 2003	.000849
July 11, 2003	.000847
July 12, 2003	.000847
July 13, 2003	.000847
July 14, 2003	.000850
July 15, 2003	.000847
July 16, 2003	.000847
July 17, 2003	.000847
July 18, 2003	.000847
July 19, 2003	.000847
July 20, 2003	.000847
July 21, 2003	.000848

FOREIGN CURRENCIES—Variances from quarterly rates for July 2003 continued):

South Korea won: (continued):

July 22, 2003	.000845
July 23, 2003	.000847
July 24, 2003	.000848
July 25, 2003	.000847
July 26, 2003	.000847
July 27, 2003	.000847
July 28, 2003	.000845
July 29, 2003	.000848
July 30, 2003	.000847
July 31, 2003	.000847

Taiwan N.T. dollar:

July 01, 2003	$0.028918
July 02, 2003	.028960
July 03, 2003	.029028
July 04, 2003	.029028
July 05, 2003	.029028
July 06, 2003	.029028
July 07, 2003	.029078
July 08, 2003	.029112
July 09, 2003	.029112
July 10, 2003	.029197
July 11, 2003	.029112
July 12, 2003	.029112
July 13, 2003	.029112
July 14, 2003	.029112
July 15, 2003	.029112
July 16, 2003	.029061
July 17, 2003	.029061
July 18, 2003	.029061
July 19, 2003	.029061
July 20, 2003	.029061
July 21, 2003	.029061
July 22, 2003	.029061
July 23, 2003	.029070
July 24, 2003	.029095
July 25, 2003	.029095
July 26, 2003	.029095
July 27, 2003	.029095
July 28, 2003	.029070
July 29, 2003	.029095
July 30, 2003	.029070
July 31, 2003	.029061

Dated: August 11, 2003

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 6–2003)

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

SUMMARY; The copyrights, trademarks, and trade names recorded with the Bureau of Customs and Border Protection during the month of July 2003. The last notice was published in the CUSTOMS BULLETIN on July 2, 2003.

Corrections or information to update files may be sent to Department of Homeland Security, Bureau of Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: July 16, 2003.

GEORGE FREDERICK MCCRAY, ESQ.
Chief,
Intellectual Property Rights Branch.

The list of recordations follows:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0300082	20030602	20230602	DESIGNS IN COPPER JANUARY 1997 DESIGNS	DESIGNS IN COPPER, INC.	N
COP0300083	20030603	20230602	LARGE FLAG PATCHWORK - DESIGN #5409	CRANSTON PRINT WORKS CO.	N
COP0300084	20030603	20230603	GREAT AMERICAN DUCK RACER	GREAT AMERICAN DUCK RACES, INC.	N
COP0300085	20030603	20230603	HULK STYLE GUIDE	MARVEL ENTERPRISES, INC.	N
COP0300086	20030603	20230603	BEAUTY TIME TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300087	20030603	20230603	TEA TIME TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300088	20030603	20230603	AWESOME SPEEDWAY TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300089	20030603	20230603	BUGS TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300090	20030603	20230603	AWESOME CIRCUS TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300091	20030603	20230603	NOAH'S ARK TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300092	20030603	20230603	MEDIEVAL TIMES TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300093	20030603	20230603	HORSE SHOW TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300094	20030603	20230603	DOG SHOW TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300095	20030603	20230603	AFRICAN ANIMALS TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300096	20030603	20230603	FARM TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300097	20030606	20230606	SAMURAI JACK STYLE GUIDE	THE CARTOON NETWORK LP, LLLP	N
COP0300098	20030611	20230611	DINOSAURS TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300099	20030611	20230611	VACATION TIME TOY BOX SET	AWESOME KIDS LLC.	N
COP0300100	20030611	20230611	PRINCESS BALLERINA TOY BOX SET	AWESOME KIDS LLC.	N
COP0300101	20030611	20230611	BATH TIME TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300102	20030611	20230611	PIRATES TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300103	20030611	20230611	CRYPTIC CREATURES TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300104	20030611	20230611	BATTLEGROUND TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300105	20030611	20230611	COWBOYS & INDIANS TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300106	20030611	20230611	COOK TIME TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300107	20030611	20230611	CONSTRUCTION TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300108	20030611	20230611	AWESOME FIRE DEPARTMENT TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300109	20030611	20230611	OCEAN LIFE TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300110	20030611	20230611	SPACE TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300111	20030611	20230611	REPTILES TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300112	20030611	20230611	CINDERELLA TOY BOX PLAY SET	AWESOME KIDS LLC.	N
COP0300113	20030613	20230613	MAGICAL MUSICAL SHOES: BALLERINA, BRIDE, CHEERLEADER	TEK NEK TOYS INTERNATIONAL INC.	N
COP0300114	20030618	20230618	DUCKOUT	MARK BOLDT	N
COP0300115	20030618	20230618	SLAMDUCK	MARK BOLDT	N
COP0300116	20030619	20230619	KATE SPADE MULTI-STRIPE	KATE SPADE, LLC	N
COP0300117	20030619	20230619	SPRINKLE K	KATE SPADE, LLC	N
SUBTOTAL RECORDATION TYPE		36			
TMK0300413	20030602	20120915	SPAM	HORMEL FOODS LLC.	N
TMK0300414	20030602	20111225	EL-ADI	TSENG-LU CHIEN	N
TMK0300415	20030603	20130211	CRUJITOS	RECOT, INC.	N
TMK0300416	20030603	20120924	STORM & DESIGN	RIRI SA	N
TMK0300417	20030603	20120402	CLIPCASE	DEXAS INTERNATIONAL, LTD.	N
TMK0300418	20030603	20100926	TOMMY	TOMMY HILFIGER LICENSING, INC.	N
TMK0300419	20030603	20120128	CREST DESIGN	TOMMY HILFIGER LICENSING, INC.	N
TMK0300420	20030603	20130216	GREEN EYELET DEVICE	TOMMY HILFIGER LICENSING, INC.	N
TMK0300421	20030605	20040125	CONFIGURATION OF A HAND PUMP TRIGGER SPRAYER	CIT GROUP/BUSINESS CREDIT, INC.	N
TMK0300422	20030606	20121116	M (STYLIZED)	BASEBALL EXPOS, L.P.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0300423	20030606	20120425	MENTOS	PERFETTI VAN MELLE BENELUX B.V.	N
TMK0300424	20030606	20081219	WHITE FLOWER DESIGN	HOE HIN PAK FAH YEOW MANUFACTORY	N
TMK0300425	20030606	20070422	WHITE FLOWER	HOE HIN PAK FAH YEOW MANUFACTORY	N
TMK0300426	20030606	20130422	BEYBLADE	HASBRO, INC.	N
TMK0300427	20030606	20130309	S&W MONOGRAM	SMITH & WESSON CORP.	N
TMK0300428	20030606	20100125	TYPE A	SPORT INC.	N
TMK0300429	20030606	20100125	A (AND DESIGN)	SPORT INC.	N
TMK0300430	20030606	20090921	ATLANTIS	SPORT INC.	N
TMK0300431	20030606	20040823	DIVISION 23	SPORT INC.	N
TMK0300432	20030606	20120625	IMAGINATION DESK	LEAPFROG ENTERPRISES, INC.	N
TMK0300433	20030613	20130506	COMPACT DISC RECORDABLE & DESIGN	KONINKLIJKE PHILIPS ELECTRONICS	N
TMK0300434	20030613	20100904	DESIGN (HAND TRUCK)	MAGLINE, INC.	N
TMK0300435	20030613	20120213	DESIGN	NEW COLT HOLDING CORP.	N
TMK0300436	20030613	20120213	COLT	NEW COLT HOLDING CORP.	N
TMK0300437	20030613	20110313	H. UPMANN	CUBAN CIGAR BANDS N.V.	N
TMK0300438	20030613	20110313	H. UPMANN	CUBAN CIGAR BANDS N.V.	N
TMK0300439	20030613	20130309	AX ARMANI EXCHANGE	GA MODEFINE S.A.	N
TMK0300440	20030618	20130121	NO MERCY	WORLD WRESTLING FEDERATION	N
TMK0300441	20030618	20070317	WRESTLEMANIA	WORLD WRESTLING FEDERATION	N
TMK0300442	20030618	20090601	BIG DADDY COOL	WORLD WRESTLING FEDERATION	N
TMK0300443	20030618	20121029	KING OF THE RING	WORLD WRESTLING FEDERATION	N
TMK0300444	20030618	20120528	THE ROCK	WORLD WRESTLING FEDERATION	N
TMK0300445	20030618	20100905	SABLE	WORLD WRESTLING FEDERATION	N
TMK0300446	20030618	20060319	HUMALOG	ELI LILLY AND COMPANY	N
TMK0300447	20030618	20050903	PROZAC	ELI LILLY AND COMPANY	N
TMK0300448	20030619	20080113	DIESEL	WORLD WRESTLING FEDERATION	N
TMK0300449	20030619	20080113	GOLDUST	WORLD WRESTLING FEDERATION	N
TMK0300450	20030619	20070812	RAW	WORLD WRESTLING FEDERATION	N
TMK0300451	20030619	20130302	UNDERTAKE	WORLD WRESTLING FEDERATION	N
TMK0300452	20030619	20121015	THE ROCK	WORLD WRESTLING FEDERATION	N
TMK0300453	20030619	20130325	JUDGMENT DAY	WORLD WRESTLING FEDERATION	N
TMK0300454	20030619	20100411	JACK SPADE	KATE SPADE, LLC	N
TMK0300455	20030619	20120604	UNFORGIVEN	WORLD WRESTLING FEDERATION	N
TMK0300456	20030619	20120924	NO WAY OUT	WORLD WRESTLING FEDERATION	N
TMK0300457	20030619	20121126	S SUMMERSLAM AND DESIGN	WORLD WRESTLING FEDERATION	N
TMK0300458	20030619	20121112	NO WAY OUT	WORLD WRESTLING FEDERATION	N
TMK0300459	20030620	20130416	HERDEZ	HERDEZ, S.A. DE C.V.	N
TMK0300460	20030620	20090807	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300461	20030620	20121020	DESIGN (MEDUSA HEAD)	GIANNI VERSACE S.P.A.	N
TMK0300462	20030620	20120421	V2 BY VERSACE AND DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300463	20030620	20120630	V'E VERSACE (STYLIZED)	GIANNI VERSACE S.P.A.	N
TMK0300464	20030620	20110416	GIANNI VERSACE (STYLIZED)	GIANNI VERSACE S.P.A.	N
TMK0300465	20030620	20110403	VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300466	20030620	20100919	VERSACE CLASSIC V2 AND DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300467	20030620	20110206	VERSACE JEANS COUTURE	GIANNI VERSACE S.P.A.	N
TMK0300468	20030620	20090601	V VERSACE SPORT AND DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300469	20030620	20090223	VERSACE YELLOW JEANS WOMAN AND DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300470	20030620	20080428	VERSACE GREEN JEANS MAN AND DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300471	20030620	20091007	VERSACE THE DREAMER	GIANNI VERSACE S.P.A.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0300472	20030620	20080602	VERSACE INTENSIVE	GIANNI VERSACE S.P.A.	N
TMK0300473	20030620	20080922	VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300474	20030620	20070708	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300475	20030620	20070909	VERSACE TECHNO JEANS	GIANNI VERSACE S.P.A.	N
TMK0300476	20030620	20090914	VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300477	20030620	20080602	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300478	20030620	20060507	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300479	20030620	20070415	VERSACE RED JEANS	GIANNI VERSACE S.P.A.	N
TMK0300480	20030620	20070415	VERSACE BLUE JEANS	GIANNI VERSACE S.P.A.	N
TMK0300481	20030620	20071216	VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300482	20030620	20050228	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300483	20030620	20041115	VERSUS GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300484	20030620	20050425	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK0300485	20030620	20070722	DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300486	20030620	20050124	DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300487	20030620	20070715	DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300488	20030620	20110430	ISTANTE	GIANNI VERSACE S.P.A.	N
TMK0300489	20030620	20090404	ISTANTE	GIANNI VERSACE S.P.A.	N
TMK0300490	20030620	20110911	VERSUS	GIANNI VERSACE S.P.A.	N
TMK0300491	20030620	20061001	DESIGN	GIANNI VERSACE S.P.A.	N
TMK0300492	20030620	20061210	DRAWING	GIANNI VERSACE S.P.A.	N
TMK0300493	20030620	20070909	VERSACE COMPUTER JEANS	GIANNI VERSACE S.P.A.	N
TMK0300494	20030625	20070603	KABOOM!	ACTIVISION, INC.	N
TMK0300495	20030625	20100109	COLTALIN	FORTUNE PHARMACAL CO., LTD.	N
TMK0300496	20030625	20060116	YULIN AND DESIGN	YULIN PHARMACEUTICAL FACTORY	N
TMK0300497	20030625	20110122	DESIGN (CHINESE CHARACTERS)	HO, MAN-SUM, DBA WAH YAN HONG	N
TMK0300498	20030625	20120811	DESIGN (CHINESE CHARACTERS)	WONG TO YICK WOOD LOCK OINTMENT	N
TMK0300499	20030625	20130202	DESIGN (PHOTOGRAPH)	WONG TO YICK WOOD LOCK OINTMENT	N
TMK0300500	20030625	20120811	WOOD LOCK	WONG TO YICK WOOD LOCK OINTMENT	N
TMK0300501	20030625	20061001	WONG TO YICK	WONG TO YICK WOOD LOCK OINTMENT	N
TMK0300502	20030625	20101204	COLTALIN FORTUNE AND DESIGN	FORTUNE PHARMACAL CO., LTD.	N
TMK0300503	20030625	20050815	ZHENG GU SHUI (STYLIZED)	YULIN PHARMACEUTICAL FACTORY	N
TMK0300504	20030625	20100313	DESIGN (FOREIGN CHARACTERS)	FORTUNE PHARMACAL CO., LTD.	N
TMK0300505	20030630	20130306	DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0300506	20030630	20130306	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0300507	20030630	20111208	DESIGN (3 ARROWS AND 3 RINGS IN A DOUBLE CIRCLE)	FABBRICA D'ARMI P. BERETTA S.P.A	N
TMK0300508	20030630	20120507	FLEXIBLE FLYER	F.F. ACQUISITION CORPORATION	N
TMK0300509	20030630	20100425	FLEXIBLE FLYER	F.F. ACQUISITION CORPORATION	N
TMK0300510	20030630	20040517	FLEXIBLE FLYER	F.F. ACQUISITION CORPORATION	N
TMK0300511	20030630	20050408	FLEXIBLE FLYER & ARROW DESIGN	F.F. ACQUISITION CORPORATION	N
TMK0300512	20030630	20060807	FLEXIBLE FLYER (STYLIZED)	F.F. ACQUISITION CORPORATION	N
TMK0300513	20030630	20121029	FLEXIBLE FLYER SINCE 1889 AND DESIGN	F.F. ACQUISITION CORPORATION	N

SUBTOTAL RECORDATION TYPE 101

TOTAL RECORDATIONS ADDED THIS MONTH 137

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 7–2003)

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

SUMMARY; The copyrights, trademarks, and trade names recorded with the Bureau of Customs and Border Protection during the month of July 2003. The last notice was published in the CUSTOMS BULLETIN on July 2, 2003.

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FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: August 12, 2003

GEORGE FREDERICK MCCRAY, ESQ.
Chief,
Intellectual Property Rights Branch.

The list of recordations follows:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0300118	20030721	20230721	BODY BALL	VALEO, INC.	N
COP0300119	20030724	20230724	GROUPWISE 6.5	NOVELL, INC.	N
SUBTOTAL RECORDATION TYPE			3		
TMK0300514	20030701	20130104	PUMA (STYLIZED)	PUMA AG RUDOLF DASSLER SPORT	N
TMK0300515	20030707	20130513	CONFIGURATION OF A RACING CAR	CARROLL HALL SHELBY TRUST	N
TMK0300516	20030709	20100930	E.G.L.	E.G.L. GEM LAB. LTD.	N
TMK0300517	20030709	20071216	EGL USA	E.G.L. GEM LAB. LTD.	N
TMK0300518	20030709	20101209	EUROPEAN GEMMOLOGICAL LABORATORY	E.G.L. GEM LAB. LTD.	N
TMK0300519	20030709	20060402	EXCEL	EDMONT P. D'ASCOLI	N
TMK0300520	20030709	20130126	FJ (STYLIZED)	ACUSHNET COMPANY	N
TMK0300521	20030709	20121109	LA COSTENA (& DESIGN)	VILORE FOODS COMPANY	N
TMK0300522	20030709	20120310	GEMZAR	ELI LILLY AND COMPANY	N
TMK0300523	20030715	20091207	PROZAC	ELI LILLY AND COMPANY	N
TMK0300524	20030715	20120924	NOEL DESIGN	KATE SPADE, LLC	N
TMK0300525	20030715	20110403	DESIGN ONLY	MOTHER-EASE INC.	N
TMK0300526	20030715	20110327	DESIGN ONLY	MOTHER-EASE INC.	N
TMK0300527	20030715	20110327	DESIGN ONLY	MOTHER-EASE INC.	N
TMK0300528	20030715	20120108	DESIGN ONLY	SADOWSKY GUITARS LTD.	N
TMK0300529	20030715	20130504	ASICS	ASICS CORPORATION	N
TMK0300530	20030715	20120711	DESIGN ONLY	ASICS CORPORATION	N
TMK0300531	20030715	20121203	DESIGN ONLY	QUIK DRIVE USA INC.	N
TMK0300532	20030715	20130513	DESIGNERS ORIGINALS STUDIO	HAMPSHIRE GROUP, LIMITED	N
TMK0300533	20030716	20070304	JPG PARIS AND DESIGN	GAULME SOCIETE ANONYME	N
TMK0300534	20030716	20081011	JEAN PAUL GAULTIER	GAULME SOCIETE ANONYME	N
TMK0300535	20030716	20081103	JEAN PAUL GAULTIER "LE MALE"	GAULME SOCIETE ANONYME	N
TMK0300536	20030716	20080202	JEAN PAUL GAULTIER	GAULME SOCIETE ANONYME	N
TMK0300537	20030716	20060109	HAUTE PARFUMERIE JEAN PAUL GAULTIER	GAULME SOCIETE ANONYME	N
TMK0300538	20030716	20100829	GAULTIER	GAULME SOCIETE ANONYME	N
TMK0300539	20030716	20070304	JPG PARIS AND DESIGN	GAULME SOCIETE ANONYME	N
TMK0300540	20030716	20120806	SILHOUSETTED BATTER LOGO DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES	N
TMK0300541	20030716	20121224	UNFORGIVEN	WORLD WRESTLING FEDERATION	N
TMK0300542	20030716	20130128	ROYAL RUMBLE	WORLD WRESTLING FEDERATION	N
TMK0300543	20030716	20120528	THE ROCK	WORLD WRESTLING FEDERATION	N
TMK0300544	20030716	20130128	THE HURRICANE	WORLD WRESTLING FEDERATION	N
TMK0300545	20030716	20121112	NO WAY OUT	WORLD WRESTLING FEDERATION	N
TMK0300546	20030716	20120910	ROYAL RUMBLE	WORLD WRESTLING FEDERATION	N
TMK0300547	20030716	20120924	WRESTLEMANIA	WORLD WRESTLING FEDERATION	N
TMK0300548	20030716	20121022	SLOBBER-KNOCKER	WORLD WRESTLING FEDERATION	N
TMK0300549	20030717	20121126	KATE SPADE NEW YORK	KATE SPADE, LLC	N
TMK0300550	20030717	20111225	KATE SPADE	KATE SPADE, LLC	N
TMK0300551	20030718	20130211	JUDGMENT DAY	WORLD WRESTLING FEDERATION	N
TMK0300552	20030718	20121015	KANE	WORLD WRESTLING FEDERATION	N
TMK0300553	20030718	20121112	EDGE	WORLD WRESTLING FEDERATION	N
TMK0300554	20030718	20130211	RIKISHI	WORLD WRESTLING FEDERATION	N
TMK0300555	20030718	20120910	LAYETH THE SMACKETH DOWN	WORLD WRESTLING FEDERATION	N
TMK0300556	20030718	20121008	JUST BRING IT	WORLD WRESTLING FEDERATION	N
TMK0300557	20030718	20121029	BACKLASH	WORLD WRESTLING FEDERATION	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0300558	20030718	20121022	Y2J	WORLD WRESTLING FEDERATION	N
TMK0300559	20030721	20111229	KENWORTH	PACCAR INC.	N
TMK0300560	20030721	20120310	KW AND DESIGN	PACCAR INC.	N
TMK0300561	20030723	20121001	EA SPORTS	ELECTRONIC ARTS INC.	N
TMK0300562	20030723	20121119	EA GAMES	ELECTRONIC ARTS INC.	N
TMK0300563	20030723	20121021	SUDAFED	WARNER-LAMBERT COMPANY	N
TMK0300564	20030723	20091219	SUMMERSLAM	WORLD WRESTLING FEDERATION	N
TMK0300565	20030723	20031016	OCB	DRL ENTERPRISES, INC.	N
TMK0300566	20030723	20050321	SUMMERSLAM	WORLD WRESTLING FEDERATION	N
TMK0300567	20030723	20130401	SUMMERSLAM	WORLD WRESTLING FEDERATION	N
TMK0300568	20030723	20130413	AHA	ADAPTEC INC.	N
TMK0300569	20030724	20110710	AMPHORA	TOP TOBACCO L.P.	N
TMK0300570	20030724	20101010	DRUM	TOP TOBACCO L.P.	N
TMK0300571	20030724	20040705	FOUR ACES	TOP TOBACCO L.P.	N
TMK0300572	20030724	20091123	TOP AND DESIGN	TOP TOBACCO L.P.	N
TMK0300573	20030724	20110917	SCOOP AWAY	THE CLOROX PET PRODUCTS COMPANY	N
TMK0300574	20030724	20050827	TUMI	TUMI INC.	N
TMK0300575	20030724	20130516	WITTNAUER	WESTFIELD LICENSING COMPANY	N
TMK0300576	20030724	20071014	2 IN 1	REPUBLIC TOBACCO L.P.	N
TMK0300577	20030724	20101107	ADJUST-A-ROLL	REPUBLIC TOBACCO L.P.	N
TMK0300578	20030724	20120611	GAMBLER	REPUBLIC TOBACCO L.P.	N
TMK0300579	20030724	20110611	GAMBLER AND DESIGN	REPUBLIC TOBACCO L.P.	N
TMK0300580	20030724	20110807	GOLDEN WRAP	REPUBLIC TOBACCO L.P.	N
TMK0300581	20030724	20111009	GOLDEN WRAP TOBACCO WRAPS AND DESIGN	REPUBLIC TOBACCO L.P.	N
TMK0300582	20030724	20111106	LARGO	REPUBLIC TOBACCO L.P.	N
TMK0300583	20030724	20120820	LARGO AND L DESIGN	REPUBLIC TOBACCO L.P.	N
TMK0300584	20030724	20110611	MISCELLANEOUS DESIGN (BORDER WITH LEAVES)	REPUBLIC TOBACCO L.P.	N
TMK0300585	20030724	20080324	VENTURA WHITES AND DESIGN	REPUBLIC TOBACCO L.P.	N
TMK0300586	20030724	20130527	IHAVEISSUES	LINDA C. WHITFIELD	N
TMK0300587	20030724	20130702	CHEE.TOS	RECOT, INC,	N
TMK0300588	20030724	20130322	GOTTA GETTA GUND	GUND, INC.	N
TMK0300589	20030724	20130511	AIRPORT GRADE	DALTON ENTERPRISES, INC.	N
TMK0300590	20030724	20050105	HEYCO	HEYCO INC.	N
TMK0300591	20030728	20120804	VELCRO	VELCRO INDUSTRIES, B.V.	N
TMK0300592	20030728	20130610	FASTPATH	LVL7 SYSTEMS INC.	N
TMK0300593	20030728	20130629	H AND DESIGN (ACURA LOGO)	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300594	20030728	20101226	S2000	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300595	20030728	20111218	RSX	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300596	20030728	20110925	VTEC	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300597	20030728	20120514	I-VTEC	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300598	20030728	20120407	NSX	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300599	20030728	20120101	INTEGRA TYPE R	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300600	20030728	20120402	INTEGRA TYPE R	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300601	20030728	20120716	INTEGRA TYPE R	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0300603	20030729	20070429	HEYCO AND DESIGN	HEYCO, INC.	N
TMK0300604	20030729	20130225	HEYCO AND DESIGN	HEYCO, INC.	N
TMK0300605	20030729	20120820	DESIGN ONLY	PELICAN PRODUCTS, INC.	N
TMK0300606	20030729	20121217	DESIGN ONLY	GUANGZHOU HYGIENIC MATERIAL	N
TMK0300607	20030729	20061119	UNIVERSAL	UNIVERSAL FURNITURE INT'L., INC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0300608	20030729	20050507	DESIGN ONLY	LA LECHE LEAGUE INTERNATIONAL	N
TMK0300609	20030729	20120723	SLIMPOINT	SUN COAST MERCHANDISE CORP.	N

SUBTOTAL RECORDATION TYPE 95

TOTAL RECORDATIONS ADDED THIS MONTH 97

Bureau of Customs and Border Protection

General Notices

19 CFR Part 103

RIN 1515–AD29

[CBP Dec. 03–02]

CONFIDENTIALITY OF COMMERCIAL INFORMATION

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Interim rule; solicitation of comments.

SUMMARY: This document amends Chapter I of Title 19 of the Code of Federal Regulations on an interim basis regarding the disclosure procedures that the Bureau of Customs and Border Protection (CBP) follows when commercial information is provided to CBP by a business submitter. The predecessor of CBP—the U.S. Customs Service—as a component of the Treasury Department, had followed these procedures consistent with a Department of the Treasury regulation that implemented an Executive Order setting forth the procedure for the treatment of commercial information. As CBP is now a component of the Department of Homeland Security, CBP is setting forth this established policy in its own regulations.

DATES: This interim rule is effective [insert date of publication in the **Federal Register**]. Comments must be received on or before [insert date 60 days from publication in the **Federal Register**].

ADDRESSES: Written comments may be addressed to the Customs and Border Protection Bureau, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at Customs and Border Protection Bureau, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Disclosure Law Branch, Office of Regulations and Rulings, (202) 572–8720.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The regulations of the Bureau of Customs and Border Protection (CBP), regarding information requested pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, are set forth in part 103 of Chapter I of Title 19 of the Code of Federal Regulations (19 CFR part 103). These regulations were the regulations of the former U.S. Customs Service (Customs). As a component of the Department of the Treasury, Customs supplemented its regulations with the Department of the Treasury regulations (found at 31 CFR part 1) regarding public access to records. Section 1.6 of the Department of the Treasury regulations (31 CFR 1.6) concerns the treatment of information denominated as "business information". This section provides that such information provided to the Department of the Treasury by a "business submitter" shall not be disclosed pursuant to a FOIA request except in accordance with the provisions of the section. Part 103 of 19 CFR does not have a similar provision and Customs followed the Department of the Treasury's disclosure procedure set forth in 31 CFR 1.6 since it was promulgated in 1987.

Section 1.6 was promulgated in accordance with Executive Order 12600 of June 23, 1987, 52 FR 23781, 3 CFR part 1987, 235, 23 Weekly Comp.Pres. Doc. 727. Executive Order 12600 ordered the head of each Executive department to issue a predisclosure notification procedure for FOIA requests concerning confidential commercial information.

On March 1, 2003, Customs was transferred from the Treasury Department to the new Department of Homeland Security (DHS). Pub.L. 107–296, 6 U.S.C. 133, 116 Stat. 2135. DHS published procedures for the public on how to obtain information from DHS in an interim rule published in the Federal Register (68 FR 4055) on January 27, 2003. Under this rule, established at 6 CFR, Chapter I, part 5, the DHS FOIA provisions apply to all Department components transferred to the DHS, except to the extent that such component has adopted separate guidance under the FOIA (6 CFR 5.1(a)(2)).

The DHS FOIA regulation at 6 CFR 5.8(c) provides that a submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under exemption 4 of the FOIA. (Exemption 4 of the FOIA protects trade secrets and commercial or financial information that is privileged or confidential.) The regulations go on to say that, before business information will be re-

leased, notice will be provided to business submitters whenever (1) a FOIA request is made that seeks the business information that has been designated in good-faith as confidential, or (2) the DHS component agency has reason to believe the information may be protected from disclosure. When notice is provided, the submitter will be required to submit a detailed written statement specifying the grounds for withholding any portion of the information and must show why the information is a trade secret or commercial or financial information that is privileged or confidential.

Customs, in accordance with the Treasury Regulations (31 CFR 1.6), had not required business submitters to designate information as protected from disclosure as privileged or confidential under exemption 4 of the FOIA for the agency to not disclose "commercial information", defined as trade secret, commercial, or financial information obtained from a person. The Treasury regulations provide that a component of the Treasury Department can determine for itself that information it receives from business submitters will not be disclosed pursuant to a FOIA request. If the agency determines the information is confidential, it can protect the information as confidential without notifying the business submitter that a FOIA request has been received.

For example, Customs routinely considered commercial information appearing on entry documents as confidential and privileged under exemption 4 of the FOIA. Customs did not require business submitters to designate that information as confidential and did not require the business submitters to respond to a notice from Customs with a written detailed statement specifying the reasons for the claim of confidentiality.

Accordingly, CBP is issuing this document to assure the trading community that the transfer of Customs from Treasury to DHS will not affect the treatment of commercial information which business submitters provide to CBP. In this document CBP is amending its regulations on an interim basis to set forth the established policy it had been following pursuant to the Treasury regulations.

Discussion of Interim Amendments Concerning the Disclosure of Commerical Information

CBP is adding a new § 103.35 to its regulations to set forth its policy under the FOIA for the disclosure of confidential commercial information. The text will provide that "commercial information", defined as "trade secret, commercial, or financial information obtained from a person", that has been provided to CBP by a business submitter will be considered privileged or confidential and will not be disclosed except as provided in the section. This section will explain the various notice requirements CBP must give to the business submitter whose commercial information is the subject of a FOIA request for information, the procedure a business submitter must follow to

object to the proposed disclosure, the notice of intent to disclose provisions that CBP must follow when it decides to disclose requested commercial information, and exceptions to the notice requirements. There is no affirmative requirement of business submitters to designate information as privileged or confidential.

It is noted that the new section does allow for a business submitter to designate information as confidential in § 103.35(b)(1)(i). Business submitters may avail themselves of this option when such a designation is feasible, as when submitting a ruling request. However, in situations when there is no method by which to designate information as confidential, such as on entry documentation, it is CBP's position that the commercial information will not be disclosed as a matter of policy. See § 103.35(b)(2)(i).

COMMENTS

Before adopting these interim regulations as a final rule, consideration will be given to any written comments timely submitted to CBP, including comments on the clarity of this interim rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 103.11(b) of the Title 19 of the Code of Federal Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Customs and Border Protection Bureau, 799 9th Street, N.W., Washington, D.C. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

INAPPLICABILITY OF PRIOR NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

CBP has determined, pursuant to 5 U.S.C 553(b)(B), that it would be contrary to the public interest to issue this rule with prior notice because the rule sets forth an established treatment of commercial information and seeks to assure the trade community that such submissions will continue to be treated the same by CBP in the Department of Homeland Security as the information was treated when Customs was under the Department of the Treasury. For these reasons, and pursuant to 5 U.S.C. 553(d)(3), good cause exists to make this rule effective immediately without a 30-day delayed effective date However, as previously stated, CBP invites comments before determining whether to adopt these interim regulations as a final rule.

THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C.

601 *et seq.*), do not apply. Further, this document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

LIST OF SUBJECTS IN 19 CFR PART 103

Administrative practice and procedure, Confidential commercial information, Freedom of information, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth above, part 103 of Title 19 of the Code of Federal Regulations (19 CFR part 103), is amended as set forth below:

PART 103—AVAILABILITY OF INFORMATION

1. The general authority citation for part 103 continues, and a specific authority citation for § 103.35 is added, to read as follows:

AUTHORITY: 5 U.S.C. 301, 552, 552a; 19 U.S.C. 66, 1431, 1624, 1628; 31 U.S.C. 9701.

* * * * * * *

Section 103.35 also issued under E.O. 12600 of June 23, 1987.

2. Section 103.35 is added to subpart C to read as follows:

§ 103.35 Confidential commercial information; exempt.

(a) *In general.* For purposes of this section, "commercial information" is defined as trade secret, commercial, or financial information obtained from a person. Commercial information provided to CBP by a business submitter will be treated as privileged or confidential and will not be disclosed pursuant to a Freedom of Information Act (FOIA) request or otherwise made known in any manner except as provided in this section.

(b) *Notice to business submitters of FOIA requests for disclosure.* Except as provided in paragraph (b)(2) of this section, CBP will provide business submitters with prompt written notice of receipt of FOIA requests or appeals that encompass their commercial information. The written notice will describe either the exact nature of the commercial information requested, or enclose copies of the records or those portions of the records that contain the commercial information. The written notice also will advise the business submitter of its right to file a disclosure objection statement as provided under paragraph (c)(1) of this section. CBP will provide notice to business submitters of FOIA requests for the business submitter's commercial information for a period of not more than ten years after the date the business submitter provides CBP with the information, unless the

business submitter requests, and provides acceptable justification for, a specific notice period of greater duration.

(1) *When notice is required.* CBP will provide business submitters with notice of receipt of a FOIA request or appeal whenever:

(i) The business submitter has in good faith designated the information as commercially- or financially-sensitive information. The business submitter's claim of confidentiality should be supported by a statement by an authorized representative of the business entity providing specific justification that the information in question is considered confidential commercial or financial information and that the information has not been disclosed to the public; or

(ii) CBP has reason to believe that disclosure of the commercial information could reasonably be expected to cause substantial competitive harm.

(2) *When notice is not required.* The notice requirements of this section will not apply if:

(i) CBP determines that the commercial information will not be disclosed;

(ii) The commercial information has been lawfully published or otherwise made available to the public; or

(iii) Disclosure of the information is required by law (other than 5 U.S.C. 552).

(c) *Procedure when notice given.*—(1) *Opportunity for business submitter to object to disclosure.* A business submitter receiving written notice from CBP of receipt of a FOIA request or appeal encompassing its commercial information may object to any disclosure of the commercial information by providing CBP with a detailed statement of reasons within ten days of the date of the notice (exclusive of Saturdays, Sundays, and legal public holidays). The statement should specify all the grounds for withholding any of the commercial information under any exemption of the FOIA and, in the case of Exemption 4, should demonstrate why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. The disclosure objection information provided by a person pursuant to this paragraph may be subject to disclosure under the FOIA.

(2) *Notice to FOIA requester.* When notice is given to a business submitter under paragraph (b)(1) of this section, notice will also be given to the FOIA requester that the business submitter has been given an opportunity to object to any disclosure of the requested commercial information. The requester will be further advised that a delay in responding to the request may be considered a denial of access to records and that the requester may proceed with an administrative appeal or seek judicial review, if appropriate. The notice will also invite the FOIA requester to agree to a voluntary extension(s) of time so that CBP may review the business submitter's disclosure objection statement.

(d) *Notice of intent to disclose.* CBP will consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose commercial information. Whenever CBP decides to disclose the requested commercial information over the objection of the business submitter, CBP will provide written notice to the business submitter of CBP's intent to disclose, which will include:

(1) A statement of the reasons for which the business submitter's disclosure objections were not sustained;

(2) A description of the commercial information to be disclosed; and,

(3) A specified disclosure date which will not be less than ten days (exclusive of Saturdays, Sundays, and legal public holidays) after the notice of intent to disclose the requested information has been issued to the business submitter. Except as otherwise prohibited by law, CBP will also provide a copy of the notice of intent to disclose to the FOIA requester at the same time.

(e) *Notice of FOIA lawsuit.* Whenever a FOIA requester brings suit seeking to compel the disclosure of commercial information covered by paragraph (b)(1) of this section, CBP will promptly notify the business submitter in writing.

Dated: June 20, 2003

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

[Published in the Federal Register, August 11, 2003 (47453)]

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19 CFR PART 102

[CBP Dec. 03–11]

TECHNICAL CORRECTIONS: RULES OF ORIGIN OF IMPORTED GOODS (OTHER THAN TEXTILE AND APPAREL PRODUCTS) FOR PURPOSES OF THE NAFTA

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule; corrections.

SUMMARY: This document makes technical corrections to the Customs Regulations to reflect the terms of the current version of the Harmonized Tariff Schedule of the United States within the specific tariff shift rules and related requirements for determining the country of origin of imported goods (other than textiles and apparel products) for purposes of the NAFTA.

DATES: These corrections are effective July 24, 2003.

FURTHER INFORMATION CONTACT: Robert Altneu, International Agreements Staff, Office of Regulations and Rulings, Customs and Border Protection, 1300 Pennsylvania Avenue, N.W., Washington, D.C., 20229, Tel. (202) 572–8754.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 102.20 of the Customs Regulations (19 CFR 102.20) lists specific tariff shift rules and other requirements for determining the country of origin of imported goods (other than textiles and apparel products covered by § 102.21) for certain North American Free Trade Agreement (NAFTA) purposes. Specifically, § 102.20 prescribes tariff rules that may be used to determine when a good is a good of a NAFTA country (United States, Canada or Mexico). *See* the NAFTA Implementation Act, Public Law 103–182, 107 Stat. 437 (December 8, 1993).

Section 102.20 presents the origin rules in terms of tariff classification changes (tariff shifts) and/or specific operations which are required in order for origin to be conferred. The rule applicable to a particular good is determined by that good's tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) at the time the country of origin determination is made.

NEED FOR CORRECTION

Pursuant to section 1205 of the Omnibus Trade and Competitiveness Act of 1988, the International Trade Commission is required to keep the HTSUS under continuous review and prepare investigations proposing modifications thereto to the President. *See* U.S. International Trade Commission Investigation No. 1205–5 (final), Proposed Modifications to the Harmonized Tariff Schedule of the United States, Publication 3430 (June 2001).

In 2002, the HTSUS was amended which resulted in the transfer of certain goods, for tariff classification purposes, to different or newly created tariff provisions, as well as the removal of tariff provisions currently referenced in § 102.20. *See* Presidential Proclamation 7515, dated December 18, 2001 (66 FR 66549, dated December 26, 2001). The changes to the HTSUS involve product coverage and/or numbering of select headings and subheadings, and are not intended to have any other substantive effect. *See* T.D. 96–48, Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement, 61 FR 28934 (June 6, 1996) and 60 FR 22312 (May 5, 1995). This document makes technical corrections to § 102.20 to reflect the terms of the

current version of the HTSUS. The following examples are offered to illustrate the need for technical corrections to § 102.20.

Example: Pursuant to the existing terms of § 102.20(b), the tariff shift rule for HTSUS headings 1301–1302 permits a change to these headings "from any other chapter." Prior to the 2002 amendments to the HTSUS, poppy straw concentrates were classifiable in Chapter 13 and therefore did not undergo the requisite tariff shift necessary to confer origin. As a result of the 2002 amendments to the HTSUS, certain concentrates of poppy straw were moved from Chapter 13 and provided for under subheading 2939.11.00, HTSUS. Poppy straw concentrates classifiable in this provision (Chapter 29) would now satisfy the tariff shift rule for Chapter 13 pursuant to the existing terms of § 102.20(b). In order to reflect the original scope of the tariff shift rule for Chapter 13 within § 102.20(b), the tariff shift rule needs to be amended to specifically exclude changes from HTSUS subheading 2939.11 from conferring origin.

Example: In 2002, a new subheading was created at 1904.30.00, HTSUS, which provides for "bulgur wheat." This product was previously classified in the basket "other" provision under subheading 1904.90.00, HTSUS. As the new subheading 1904.30.00, HTSUS, is not included in the tariff shift rules set forth in § 102.20(d), the goods classifiable under this provision are currently precluded from having their origin determined pursuant to § 102.20(d). The technical corrections in this document amend the tariff shift rules in § 102.20(d) to add this new tariff provision and the rule "from any other heading," which was the rule for bulgur wheat when it was classified under subheading 1904.90 in the 2001 version of the HTSUS.

EXECUTIVE ORDER 12866, REGULATORY FLEXIBILITY ACT, INAPPLICABILITY OF PRIOR PUBLIC NOTICE AND COMMENT PROCEDURES AND DELAYED EFFECTIVE DATE REQUIREMENTS

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866. Because these amendments merely update the Customs Regulations by reflecting the terms of the 2002 HTSUS within the specific tariff shift rules and related requirements for determining the country of origin of imported goods (other than textiles and apparel products) for purposes of the NAFTA, Customs and Border Protection (CBP) has determined, pursuant to the provisions of 5 U.S.C. 553(b)(B), that prior public notice and comment procedures on this regulation are unnecessary and contrary to the public interest. For the same reasons, pursuant to the provisions of 5 U.S.C. 553(d)(3), there is good cause for dispensing with a delayed effective date. Because the document is not subject to the requirements of 5 U.S.C. 553, as noted, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

DRAFTING INFORMATION

The principal author of this document was Ms. Suzanne Kingsbury, Regulations Branch, Office of Regulations and Rulings, CBP. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 102

Customs duties and inspection, Imports, Rules of Origin, Trade agreements.

AMENDMENT TO THE REGULATIONS

For the reasons stated above, part 102 of the Customs Regulations (19 CFR part 102) is amended as set forth below.

PART 102—RULES OF ORIGIN

1. The authority citation for part 102 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1624, 3314, 3592.

2. In § 102.20, the table is amended by:

(a) Removing the entries for "2009.11–2009.30", "2009.40–2009.80", "2816.20", "2816.30", "2841.10–2841.40", "2901.10–2901.90", "2905.49–2905.50", "2907.29–2907.30", "2933.11–2934.90", "3002.90", "3809.91–3809.99", "3817.10–3817.20", "4101–4103", "4104–4107", "4108–4111", "4601", "4811.10–4811.31", "4811.39", "4811.40–4811.90", "4823.11", "4823.20–4823.59", "6812.10", "6812.20", "6812.30", "6812.40", "8101.10–8101.92", "8101.93", "8102.10–8102.92", "8102.93", "8103.10–8113.00", "8508.10–8508.80", "8508.90", "9009.90", "9021.11", "9021.19", and "9112.10–9112.80";

(b) Adding entries, in numerical order, for "1904.30", "2009.11–2009.39", "2009.41–2009.80", "2816.40", "2841.10–2841.30", "2901.10–2901.29", "2905.49–2905.59", "2907.29", "2933.11–2934.99", "3006.70", "3006.80", "3809.91–3809.93", "3817", "3825.10–3825.69", "3825.90", "4101", "4102", "4103", "4104–4106", "4107", "4112", "4113", "4114.10–4115.20", "4601.20–4601.99", "4811", "4823.12", "4823.20–4823.40", "8101.10–8101.95", "8101.96", "8102.10–8102.95", "8102.96", "8103.20–8113.00", "9009.91–9009.99", "9021.10", and "9112.20";

(c) Revising the entries in the "Tariff shift and/or other requirements" column adjacent to the "HTSUS" column listing for "1301–1302", "2821.20", "2937–2941", "3001.10", "3001.20–3001.90", "3002.10–3002.90", "3003.10", "3003.20", "3003.31", "3003.39", "3003.40", "3003.90", "3004.10", "3004.20", "3004.31", "3004.32", "3004.39", "3004.40", "3004.50", "3004.90", "3005.10", "3006.10", "3006.20–3006.60", "3402.11", "3402.12–3402.20", "4401–4411",

"6812.90", "8467.91–8467.99", "8471.60–8472.90", "8479.10–8479.89", and "9404.30–9404.90"; and

(d) Adding in paragraph (h) titled "Section VIII: Chapters 41 through 43", in the "Chapter 42 Note" between the clauses "4202.32.40 through 4202.32.95" and "4202.92.15 through 4202.92.30", the reference ", 4202.92.05,".

The additions and revisions read as follows:

§ 102.20 Specific rules by tariff classification.

*	*	*	*	*	*	*
HTSUS		*Tariff shift and/or other requirements*				
*	*	*	*	*	*	*
1301–1302		A change to heading 1301 through 1302 from any other chapter, except from concentrates of poppy straw of subheading 2939.11.				
*	*	*	*	*	*	*
1904.30		A change to subheading 1904.30 from any other heading.				
*	*	*	*	*	*	*
2009.11–2009.39		A change to subheading 2009.11 through 2009.39 from any other chapter.				
2009.41–2009.80		A change to subheading 2009.41 through 2009.80 from any other chapter.				
*	*	*	*	*	*	*
2816.40		A change to subheading 2816.40 from any other subheading, except a change to oxides, hydroxides and peroxides of strontium of subheading 2816.40 from subheading 2530.90.				
*	*	*	*	*	*	*
2821.20		A change to subheading 2821.20 from any other subheading, except from earth color mineral substances of 2530.90 or from subheading 2601.11 through 2601.20.				
*	*	*	*	*	*	*
2841.10–2841.30		A change to subheading 2841.10 through 2841.30 from any other subheading, including another subheading within that group.				

HTSUS	*Tariff shift and/or other requirements*
* *	* * * * * *
2901.10–2901.29	A change to subheading 2901.10 through 2901.29 from any other subheading, including another subheading within that group, except from acyclic petroleum oils of heading 2710 or from subheading 2711.13, 2711.14, 2711.19, or 2711.29.
* *	* * * * * *
2905.49–2905.59	A change to subheading 2905.49 through 2905.59 from any other subheading, including another subheading within that group.
* *	* * * * * *
2907.29	A change to subheading 2907.29 from any other subheading, including a change to phenol-alcohols of subheading 2907.29, from polyphenols of subheading 2907.29, or a change to polyphenols of subheading 2907.29 from phenol-alcohols of subheading 2907.29, except a change from subheading 2707.99.
* *	* * * * * *
2933.11–2934.99	A change to subheading 2933.11 through 2934.99 from any other subheading, including another subheading within that group.
* *	* * * * * *
2937–2941	A change to heading 2937 through 2941 from any other heading, including another heading within that group, except a change to concentrates of poppy straw of subheading 2939.11 from poppy straw extract of subheading 1302.19.
* *	* * * * * *
3001.10	A change to subheading 3001.10 from any other subheading, except from subheading 0206.10 through 0208.90 or 0305.20, heading 0504 or 0510, or subheading 0511.99 if the change from these provisions is not to a powder classified in subheading 3001.10, and except a change from subheading 3006.80.

HTSUS	*Tariff shift and/or other requirements*
3001.20–3001.90	A change to subheading 3001.20 through 3001.90 from any other subheading, including another subheading within that group, except a change from subheading 3006.80.
3002.10–3002.90	A change to subheading 3002.10 through 3002.90 from any other subheading, including another subheading within that group, except a change from subheading 3006.80.
3003.10	A change to subheading 3003.10 from any other subheading, except from subheading 2941.10, 2941.20, 3003.20, or 3006.80.
3003.20	A change to subheading 3003.20 from any other subheading, except from subheading 2941.30 through 2941.90, or 3006.80.
3003.31	A change to subheading 3003.31 from any other subheading, except from subheading 2937.12 or 3006.80.
3003.39	A change to subheading 3003.39 from any other subheading, except from hormones or their derivatives classified in Chapter 29, or except from subheading 3006.80.
3003.40	A change to subheading 3003.40 from any other subheading, except from heading 1211, subheading 1302.11, 1302.19, 1302.20, 1302.39, or 3006.80 or alkaloids or derivatives thereof classified in Chapter 29.
3003.90	A change to subheading 3003.90 from any other subheading, provided that the domestic content of the therapeutic or prophylactic component is no less than 40 percent by weight of the total therapeutic or prophylactic content, or except from subheading 3006.80.
3004.10	A change to subheading 3004.10 from any other subheading, except from subheading 2941.10, 2941.20, 3003.10, 3003.20, or 3006.80.
3004.20	A change to subheading 3004.20 from any other subheading, except from subheading 2941.30 through 2941.90, 3003.20, or 3006.80.
3004.31	A change to subheading 3004.31 from any other subheading, except from subheading 2937.12, 3003.31, 3003.39, or 3006.80.

HTSUS	*Tariff shift and/or other requirements*
3004.32	A change to subheading 3004.32 from any other subheading, except from subheading 3003.39 or 3006.80, or from adrenal corticosteroid hormones classified in Chapter 29.
3004.39	A change to subheading 3004.39 from any other subheading, except from subheading 3003.39 or 3006.80, or from hormones or derivatives thereof classified in Chapter 29.
3004.40	A change to subheading 3004.40 from any other subheading, except from heading 1211, subheading 1302.11, 1302.19, 1302.20, 1302.39, 3003.40 or 3006.80, or alkaloids or derivatives thereof classified in Chapter 29.
3004.50	A change to subheading 3004.50 from any other subheading, except from subheading 3003.90 or 3006.80, or vitamins classified in Chapter 29 or products classified in heading 2936.
3004.90	A change to subheading 3004.90 from any other subheading, except from subheading 3003.90 or 3006.80, and provided that the domestic content of the therapeutic or prophylactic component is no less than 40 percent by weight of the total therapeutic or prophylactic content.
3005.10	A change to subheading 3005.10 from any other subheading, except from subheading 3006.80 or 3825.30.
3006.10	A change to subheading 3006.10 from any other subheading, except from subheading 1212.20, 3006.80, 3825.30, or 4206.10.
3006.20–3006.60	A change to subheading 3006.20 through 3006.60 from any other subheading, including another subheading within that group, except from subheading 3006.80 or 3825.30.
3006.70	A change to subheading 3006.70 from any other subheading, except from subheading 3006.80 or 3825.30, and provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.
3006.80	A change to subheading 3006.80 from any other chapter.

HTSUS	*Tariff shift and/or other requirements*
* * * * * * *	
3402.11	A change to subheading 3402.11 from any other subheading, except from mixed alkylbenzenes of heading 3817.
3402.12–3402.20	A change to subheading 3402.12 through 3402.20 from any other subheading, including another subheading within that group.
* * * * * * *	
3809.91–3809.93	A change to subheading 3809.91 through 3809.93 from any other subheading, including another subheading within that group.
* * * * * * *	
3817	A change to heading 3817 from any other heading, including changes from one product to another within that heading, except from subheading 2902.90.
* * * * * * *	
3825.10–3825.69	A change to subheading 3825.10 through 3825.69 from any other chapter, except from Chapter 28 through 38, 40 or 90.
3825.90	A change to subheading 3825.90 from any other subheading, except from subheading 3824.90, and provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.
* * * * * * *	
4101	A change to hides or skins of heading 4101 which have undergone a tanning (including a pretanning) process which is reversible from any other good of heading 4101 or from any other chapter; or A change to any other good of heading 4101 from any other chapter.

HTSUS	*Tariff shift and/or other requirements*
4102	A change to hides or skins of heading 4102 which have undergone a tanning (including a pre-tanning) process which is reversible from any other good of heading 4102 or from any other chapter; or A change to any other good of heading 4102 from any other chapter.
4103	A change to hides or skins of heading 4103 which have undergone a tanning (including a pre-tanning) process which is reversible from any other good of heading 4103 or from any other chapter; or A change to any other good of heading 4103 from any other chapter.
4104–4106	A change to heading 4104 through 4106 from any other heading, including another heading within that group, except from hides or skins of heading 4101 through 4103 which have undergone a tanning (including a pre-tanning) process which is reversible, or from heading 4107, 4112 or 4113.
4107	A change to heading 4107 from any other heading except from hides or skins of heading 4101 which have undergone a tanning (including a pre-tanning) process which is reversible, or from heading 4104.
4112	A change to heading 4112 from any other heading except from hides or skins of heading 4102 which have undergone a tanning (including a pre-tanning) process which is reversible, or from heading 4105.
4113	A change to heading 4113 from any other heading except from hides or skins of heading 4103 which have undergone a tanning (including a pre-tanning) process which is reversible, or from heading 4106.
4114.10–4115.20	A change to subheading 4114.10 through 4115.20 from any other subheading, including a subheading within that group.

* * * * * * *

HTSUS	*Tariff shift and/or other requirements*
4401–4411	A change to heading 4401 through 4411 from any other heading, including another heading within that group; or A change to strips continuously shaped along the ends and also continuously shaped along the edges or faces of heading 4409 from strips continuously shaped only along the edges or faces of heading 4409.
* * * * * * *	
4601.20–4601.99	A change to subheading 4601.20 through 4601.99 from any other subheading, including another heading within that group.
* * * * * * *	
4811	A change to paper or paperboard in strips or rolls of a width not exceeding 15 cm of heading 4811 from strips or rolls of a width exceeding 15 cm of heading 4811 or any other heading, except from heading 4817 through 4823; A change to paper or paperboard in rectangular (including square) sheets with the larger dimension not exceeding 36 cm or the other dimension not exceeding 15 cm in the unfolded state of heading 4811 from strips or rolls of a width exceeding 15 cm of heading 4811, paper or paperboard in rectangular (including square) sheets with the larger dimension exceeding 36 cm and the other dimension exceeding 15 cm in the unfolded state of heading 4811 or any other heading, except from heading 4817 through 4823; or A change to any other good of heading 4811 from any other chapter.
* * * * * * *	
4823.12	A change to subheading 4823.12 from any other subheading.
* * * * * * *	
4823.20–4823.40	A change to subheading 4823.20 through 4823.40 from any other chapter.

HTSUS	*Tariff shift and/or other requirements*
* *	* * * * *
6812.90	A change to subheading 6812.90 from any other heading; or A change to yarn and thread of subheading 6812.90 from any other subheading including from any other good also classified in subheading 6812.90; or A change to cords and string, whether or not plaited of subheading 6812.90 from any other subheading or from any other good also classified in subheading 6812.90, except from yarn and thread of subheading 6812.90; or, A change to woven or knitted fabric of subheading 6812.90 from any other subheading including from any other good also classified in subheading 6812.90.
* *	* * * * *
8101.10–8101.95	A change to subheading 8101.10 through 8101.95 from any other subheading, including another subheading within that group; or A change to any of the following goods classified in subheading 8101.10 through 8101.95, including from materials also classified in subheading 8101.10 through 8101.95: Matte; unwrought; bars except from rods or profiles; rods except from bars or profiles; profiles except from rods or bars; plates except from sheets or strip; sheets except from plate or strip; strip except from sheets or plate; foil except from sheet or strip.
8101.96	A change to subheading 8101.96 from any other subheading, except from subheading 8101.95.
* *	* * * * *
8102.10–8102.95	A change to subheading 8102.10 through 8102.95 from any other subheading, including another subheading within that group; or

HTSUS	*Tariff shift and/or other requirements*
	A change to any of the following goods classified in subheading 8102.10 through 8102.95, including from materials also classified in subheading 8102.10 through 8102.95: Matte; unwrought; bars except from rods or profiles; rods except from bars or profiles; profiles except from rods or bars; plates except from sheets or strip; sheets except from plate or strip; strip except from sheets or plate; foil except from sheet or strip.
8102.96	A change to subheading 8102.96 from any other subheading, except from subheading 8102.95.
* * * * * * *	
8103.20–8113.00	A change to subheading 8103.20 through 8113.00 from any other subheading, including another subheading within that group; or
	A change to any of the following goods classified in subheading 8103.20 through 8113.00, including from materials also classified in subheading 8103.20 through 8113.00: Matte; unwrought; powder except from flakes; flakes except from powder; bars except from rods or profiles; rods except from bars or profiles; profiles except from rods or bars; wire except from rod; plates except from sheets or strip; sheets except from plate or strip; strip except from sheets or plate; foil except from sheet or strip; tubes except from pipes; pipes except from tubes; tube or pipe fittings except from tubes or pipes; cables/stranded wire/plaited bands.
* * * * * * *	
8467.91–8467.99	A change to subheading 8467.91 through 8467.99 from any other heading, except from heading 8407, or except from heading 8501 when resulting from a simple assembly.
* * * * * * *	
8471.60–8472.90	A change to printing machines of subheading 8472.90 from any other subheading, except from subheading 8443.11 through 8443.60;

HTSUS	*Tariff shift and/or other requirements*
	A change to subheading 8471.60 through 8472.90 from any other subheading outside that group, except from subheading 8504.40 or heading 8473; or A change to subheading 8471.60 through 8472.90 from any other subheading within that group or from subheading 8504.90 or from heading 8473, provided that the change is not the result of simple assembly.
* * * * * * *	
8479.10–8479.89	A change to printing machines of subheading 8479.89 from any other subheading, except from subheading 8443.11 through 8443.60; or A change to subheading 8479.10 through 8479.89 from any other subheading, including another subheading within that group.
* * * * * * *	
9009.91–9009.99	A change to subheading 9009.91 through 9009.99 from any other heading.
* * * * * * *	
9021.10	A change to subheading 9021.10 from any other subheading, except from nails classified in heading 7317 or screws classified in heading 7318 when resulting from a simple assembly.
* * * * * * *	
9112.20	A change to subheading 9112.20 from any other subheading, except from subheading 9112.90 when that change is pursuant to General Rule of Interpretation 2(a).
* * * * * * *	
9404.30–9404.90	A change to down- and/or feather-filled goods classified in subheading 9404.30 through 9404.90 from any other heading; or

HTSUS	*Tariff shift and/or other requirements*
	For all other goods classified in subheading 9404.30 through 9404.90, a change from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5804, 5806, 5809 through 5810, 5901, 5903 through 5904, 5906 through 5907, or 6001 through 6006, or subheading 6307.90.

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ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

Approved: July 21, 2003

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 24, 2003 (43630)]

19 CFR PART 133

[CBP Dec. 03–12]

RIN 1515–AC98

CIVIL FINES FOR IMPORTATION OF MERCHANDISE BEARING A COUNTERFEIT MARK

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to clarify the limit on the amount of a civil fine which may be assessed by the Bureau of Customs and Border Protection (CBP; a bureau of the new Department of Homeland Security that encompasses much of the agency formerly known as the U.S. Customs Service) when imported merchandise bearing a counterfeit mark is seized under 19 U.S.C. 1526(e). The regulations currently use, as a measurement for determining the limit, the domestic value of merchandise as if it had been genuine, based on the manufacturer's suggested retail price of the merchandise at the time of seizure. The language set forth in the amended regulation adheres more closely to the statutory language, basing the limit of the civil fine on the value of the genuine good ac-

cording to the manufacturer's suggested retail price (MSRP), without any reference to domestic value. Because the MSRP excludes discounted sales and markdowns, it is usually greater than the good's domestic value. Removing the distinction between the statutory and regulatory language will clear up confusion and result in CBP more uniformly determining the amount of a civil fine when merchandise bearing a counterfeit mark is imported.

EFFECTIVE DATE: August 25, 2003.

FOR FURTHER INFORMATION CONTACT: Lynne O. Robinson, Office of Regulations and Rulings: (202) 572–8743.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Anticounterfeiting Consumer Protection Act of 1996 (the ACPA; Pub. L. 104–153, 110 Stat. 1386) was signed into law on July 2, 1996, to ensure that Federal law adequately addresses the scope and sophistication of modern counterfeiting which costs American businesses an estimated $200 billion a year worldwide. Toward that end, the ACPA amended section 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526), to provide two new tools to fight the importation of counterfeit goods: (1) the seizure, forfeiture, and destruction of merchandise bearing a counterfeit mark under 19 U.S.C. 1526(e) (section 1526(e)), as amended by section 9 of the ACPA, and (2) the imposition of a civil fine under 19 U.S.C. 1526(f) (section 1526(f)), a new section of law created under section 10 of the ACPA.

Under section 1526(e), merchandise bearing a counterfeit mark that is seized and forfeited must be destroyed except where the merchandise is not unsafe or a hazard to health and the trademark owner has consented to its disposal by one of several alternative methods (see sections 1526(e)(1),(2) and (3)). This provision ensures that a violator cannot regain possession of the forfeited goods and distribute them in some other manner (including making another attempt to import them at another U.S. port or into another country). Under section 1526(f)(1), a civil fine is assessed against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under section 1526(e). Section 1526(f)(2) provides for a fine for the first seizure in an amount up to the value the imported merchandise would have had if it were genuine, according to the manufacturer's suggested retail price (MSRP). Section 1526(f)(3) provides for a fine for subsequent seizures in the amount of up to twice the value the imported merchandise would have had if it were genuine, according to the MSRP.

On November 17, 1997, Customs published interim regulations in the Federal Register (62 FR 61231) to amend § 133.25 of the Cus-

toms Regulations (19 CFR 133.25) to reflect the ACPA's amendment of 19 U.S.C. 1526. The interim amendments were adopted as a final rule published in the **Federal Register** (63 FR 51296) on September 25, 1998. A final rule document published in the **Federal Register** (64 FR 9058) on February 24, 1999, redesignated § 133.25 as § 133.27.

Under § 133.27 of the Customs Regulations (19 CFR 133.27), CBP may impose a civil fine, in addition to any other penalty or remedy authorized by law, against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise bearing a counterfeit mark that is seized under section 1526(e) and § 133.21 of the Customs Regulations (19 CFR 133.21). Under § 133.27(a), the fine imposed for the first violation (seizure) will not be more than the domestic value of the merchandise (as set forth in § 162.43(a)) as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure. Under § 133.27(b), the fine imposed for subsequent violations will not be more than twice the domestic value of the merchandise as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure.

Upon review of § 133.27, CBP determined that the language of the regulation is inconsistent with the language of section 1526(f). The regulation employs the term "domestic value" (of the merchandise) while the statute does not use that term. Moreover, because the MSRP is exclusive of any sale or markdown of a good at retail, it is usually greater than the good's domestic value. Therefore, setting the maximum amount of a civil fine by means of a formula that includes both the domestic value of the merchandise and the value of genuine merchandise according to the MSRP is confusing and contributes to misunderstanding by both CBP personnel and the public.

A review of the regulatory history indicates that CBP, in using the term "domestic value" in § 133.27 (§ 133.25 when published as a final rule on September 25, 1998), relied on 19 U.S.C. 1606 (section 1606) and § 162.43(a) of the Customs Regulations (19 CFR 162.43(a)). Section 1606 provides that CBP will determine the domestic value of merchandise seized under the Customs laws at the time and place of appraisement. Section 162.43(a) provides that "domestic value" as used in section 1606 means the price for which seized or similar property is freely offered for sale at the time and place of appraisement and in the ordinary course of trade.

While this "domestic value appraisement rule" of section 1606 and § 162.43(a) is applicable in various circumstances involving merchandise seized under the Customs laws, its application is qualified. Under 19 U.S.C. 1600, the procedures set forth in 19 U.S.C. 1602 through 1619, including the use of domestic value as laid out in section 1606, apply to seizures of property under any law enforced or administered by CBP unless such law specifies different procedures.

Because section 1526(f) specifies the formula for imposing civil fines for the importation of merchandise bearing a counterfeit mark, the domestic value appraisement rule of section 1606 and § 162.43(a) does not apply.

This conclusion led CBP to publish a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (67 FR 39321) on June 7, 2002, which proposed to remove the term "domestic value" from § 133.27, leaving "manufacturer's suggested retail price" as the applicable measure of the penalty. The notice stated that using the MSRP as the measure for a penalty will: (1) result in a formula for setting the maximum civil fine under the regulation that more closely follows the language of the statute; (2) clarify for CBP personnel and the importing public the limit of a civil fine; (3) enhance uniformity in CBP's assessment of fines when merchandise bearing a counterfeit mark is imported and seized; and (4) ensure that the Congressional intent in enacting section 1526(f), i.e., to enhance deterrence of trade in counterfeit goods, will be uniformly served. Deterrence is furthered by the fact that the MSRP of a given article (in this case the genuine article that corresponds to imported merchandise bearing a counterfeit mark) is normally greater than its domestic value (because MSRP excludes discounted sales and markdowns) and a civil fine based on the MSRP will normally be greater.

DISCUSSION OF COMMENTS

The NPRM invited public comment, and CBP received 15 responses by the close of the comment period. Of the 11 specific comments gleaned from the 15 responses, several agreed with CBP's proposal to amend the regulation and with CBP's reasons for doing so. However, some commenters suggested changes to the proposed amendment which are discussed below:

Comment:

A commenter proposed that all previously issued fines under 19 U.S.C. 1526(f) should be canceled as they were not issued pursuant to a valid regulation.

Customs response:

CBP disagrees. All penalties were issued in a manner consistent with the provisions of the statute, i.e., fine amounts were finally set based on the MSRP. Thus, CBP will not cancel fines issued prior to the effective date of this amendment.

Comment:

A commenter proposed that CBP should not issue a penalty notice assessing a fine under 19 U.S.C. 1526(f) where the manufacturer has not determined a MSRP for its genuine product. Another commenter suggested the use of "domestic resale value" when the MSRP of a genuine good is not available.

Customs response:

CBP disagrees. CBP believes that in most cases, there will be a readily available MSRP to use in determining a fine under the statute. Occasional problematic situations will be handled on a case-by-case basis, and reasonable alternatives to using a manufacturer's MSRP, such as using the MSRP of a comparable good, will be employed with the assistance of CBP officers experienced in appraising merchandise.

Comment:

A commenter proposed that the regulation incorporate sentencing guidelines used for criminal offenses.

Customs response:

CBP disagrees. The sentencing guidelines are used by courts to determine sentences in criminal cases. Section 1526(f) provides for a civil fine which Congress sought to be imposed in addition to any other civil or criminal penalty (see section 1526(f)(4)). There is no indication that Congress wanted CBP to employ criminal sentencing guidelines in assessing penalties under section 1526(f).

Comment:

A commenter proposed that because a fine under section 1526(f) is issued at the discretion of CBP, CBP officers should be instructed to impose fines only in the most egregious circumstances.

Customs response:

CBP disagrees. The statute makes clear that a first offense and subsequent offenses are subject to penalty. There is no indication that Congress contemplated a range of offenses from minor to serious and a different result for minor offenses, whatever they might be. Further, the legislative history demonstrates strong Congressional resolve to stem the flow of counterfeit merchandise into the United States. Strict enforcement of the civil seizure and fine provisions under the statute are the means to accomplish the deterrence Congress envisioned. Violators will have the chance to submit arguments during the petitioning process for mitigation of the fine.

Comment:

A commenter proposed that an importer/petitioner be permitted to challenge CBP's finding that a good bears a counterfeit mark in its petition to mitigate a fine assessed under section 1526(f).

Customs response:

CBP does not disagree with this comment. A finding by CBP that a good bears a counterfeit mark forms the basis for a seizure under section 1526(e). A penalty under section 1526(f) follows the seizure under section 1526(e). They are separate proceedings. If a violator can successfully challenge the CBP finding that a good bears a counterfeit mark in the section 1526(e) proceeding, it will not face a sec-

tion 1526(f) proceeding. In the section 1526(f) proceeding, a petitioner may always raise the issue of whether the good in question bears a counterfeit mark. At that time, CBP may review the validity of the initial finding and may remit the section 1526(f) penalty in appropriate circumstances.

CONCLUSION

Based on the comments received and the analysis of those comments as set forth above, and after further review of this matter, CBP believes that the proposed regulatory amendments should be adopted without change. CBP notes that with adoption of these amendments to the regulation, CBP will undertake to similarly amend the guidelines it uses to mitigate penalties assessed under section 1526(f). The current guidelines are set forth in T.D. 99–76, 33 Cust. Bull. No. 43, October 27, 1999.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a Asignificant regulatory action as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

This amendment to the regulation will result in the language of the regulation more closely adhering to the language of the governing statute, thus clarifying for the public the maximum amount CBP can assess for a civil fine when merchandise bearing a counterfeit mark is imported and seized. Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is therefore certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, Customs and Border Protection. However, personnel from other offices contributed in its development.

LIST OF SUBJECTS IN 19 CFR PART 133

Counterfeit goods, Penalties, Seizures and forfeitures, Trademarks.

AMENDMENT TO THE REGULATIONS

For the reasons stated in the preamble, Part 133 of the Customs Regulations (19 CFR Part 133) is amended as follows:

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The authority citation for part 133 continues to read, in part, as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * * * *

2. Section 133.27 is revised to read as follows:

§ 133.27. Civil fines for those involved in the importation of merchandise bearing a counterfeit mark.

In addition to any other penalty or remedy authorized by law, CBP may impose a civil fine under 19 U.S.C. 1526(f) on any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that bears a counterfeit mark resulting in a seizure of the merchandise under 19 U.S.C. 1526(e) (see § 133.21 of this subpart), as follows:

(a) *First violation.* For the first seizure of merchandise under this section, the fine imposed will not be more than the value the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price in the United States at the time of seizure.

(b) *Subsequent violations*: For the second and each subsequent seizure under this section, the fine imposed will not be more than twice the value the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price in the United States at the time of seizure.

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

Approved: July 21, 2003

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 24, 2003, (43635)]

19 CFR PARTS 24 AND 111

[CBP Dec. 03–13]

RIN 1515–AC81

USER FEES

AGENCY: Customs and Border Protection, Department of Homeland Security

ACTION: Final rule.

SUMMARY: This document adopts as a final rule proposed amendments to the Customs Regulations to reflect various legislative amendments to 19 U.S.C. 58c, the Customs user fee statute, including those made by the Miscellaneous Trade and Technical Corrections Act of 1999 and the Tariff Suspension and Trade Act of 2000. The amended regulations set forth the fee structure for passengers arriving in the United States aboard commercial vessels and aircraft, provide for application of a fee to ferries in limited circumstances, and clarify how Customs and Border Protection administers certain user fees. Also, minor conforming changes are made to the regulations pertaining to customs brokers.

EFFECTIVE DATE: August 25, 2003.

FOR FURTHER INFORMATION CONTACT: Concerning user fees applicable to commercial vessel and aircraft passengers under § 24.22(g): Edward Matthews at (202) 927–0552.

Concerning the various fee payment and information submission procedures under § 24.22: Robert T. Reiley at (202) 927–1504.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 18, 2002, Customs and Border Protection (CBP; the bureau within the new Department of Homeland Security that includes the former U.S. Customs Service) published a notice of proposed rulemaking (NPRM) in the **Federal Register** (67 FR 11954) proposing to amend Part 24 of the Customs Regulations pertaining to user fees (19 CFR Part 24) and certain related sections of Part 111 pertaining to customs brokers (19 CFR Part 111). The NPRM set forth the bases for the proposed changes to Part 24 as follows: (1) Some proposed changes derived from provisions of the Miscellaneous Trade and Technical Corrections Act of 1999 (Pub. L. 106–36, 113 Stat. 127), signed into law on June 25, 1999; (2) one proposed change was based on a provision of the Tariff Suspension and Trade Act of 2000 (Pub. L. 106–476, 114 Stat. 2101), signed into law on November 9, 2000; (3) some proposed changes were based on other statutory

provisions that were not reflected in the regulations; (4) some proposed changes were designed to bring the regulations up to date with current administrative practices; (5) and one proposed change was a technical correction. The NPRM provided that the proposed changes to Part 111 were designed to clarify administration of the annual user fee and the permit fees for customs brokers. The changes that were proposed are further discussed below.

CHANGES BASED ON THE MISCELLANEOUS TRADE AND TECHNICAL CORRECTIONS ACT OF 1999

The Fee Structure

Section 2418 of the Miscellaneous Trade and Technical Corrections Act of 1999 (the Act) amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985, codified at 19 U.S.C. 58c (section 58c), which established user fees for certain services performed by CBP. Paragraph (b)(1) of section 2418 of the Act amended the fee structure set forth under section 58c(a)(5) applicable to passengers arriving in the United States on board commercial vessels or aircraft. Prior to the Act, only one fee applied to these covered passengers under section 58c(a)(5), as follows: $6.50 beginning on January 1, 1994, and applying to passengers arriving from a place outside the customs territory of the United States and $5.00 beginning on October 1, 1997, and applying to passengers arriving from a place outside the United States other than Canada, Mexico, a United States territory or possession, or an adjacent island. The amendment continued the $5 fee applicable to each passenger arriving in the United States aboard a commercial vessel or aircraft from a place outside the United States other than Canada, Mexico, a United States territory or possession, or an adjacent island. This fee, formerly provided for under section 58c(a)(5)(B), is now provided for under section 58c(a)(5)(A). The amendment also imposed, under section 58c(a)(5)(B), a fee of $1.75 per passenger arriving aboard a commercial vessel (not a commercial aircraft) from Canada, Mexico, a United States territory or possession, or an adjacent island. Under the amended statute, no fee applies in the case of passengers arriving aboard commercial aircraft from Canada, Mexico, a United States territory or possession, or an adjacent island.

In the NPRM, CBP proposed to amend § 24.22(g), Customs Regulations (19 CFR 24.22), to conform the regulations to the new fee structure of amended sections 58c(a)(5)(A) and (B).

Procedures for Payment of the New Fees

The NPRM also proposed changes to the Customs Regulations relative to the fee payment procedure. Under the current regulations, it is the responsibility of the carriers, travel agents, tour wholesalers, or other parties issuing tickets or travel documents to

collect the fee from all passengers who are subject to the fee (§ 24.22(g)(3) in the current regulations). These parties must make payment of the collected fees to CBP no later than 31 days after the close of the calendar quarter in which the fees were required to be collected from the passengers (§ 24.22(g)(4) in the current regulations). Current § 24.22(g)(4) also provides that the quarterly fee payment must be accompanied by a statement that includes the name, address, and taxpayer identification number of the party remitting the payment and the calendar quarter covered by the payment.

The NPRM proposed to amend § 24.22(g)(3) to make clear that the party responsible for collecting the fee must collect a fee when an infant travels without a ticket or travel document. This follows CBP's consistent practice of treating infants as passengers for purposes of the passenger fees. Thus, CBP proposed to add to § 24.22(g)(1) a definition of the term "passenger" making it clear that it includes infants even if the carrier does not charge for their transportation and even if the infant is carried by another passenger (rather than occupying a seat).

Because CBP, since enactment of the Act, has had to administer two fees rather than one, the NPRM also proposed to amend § 24.22(g)(4) to require the following additional information in the statement required under that section: the total number of tickets for which fees were required to be collected, as well as the total number of infants traveling without a ticket or travel document for which fees were required to be collected; the total amount of fees collected and remitted; with respect to vessel fees, the total number of tickets and non-ticketed infants for which fees were required to be collected and the total amount of fees collected; and a breakdown of vessel fees collected and remitted under section 58c(a)(5)(A) (the $5 per passenger fee) and section 58c(a)(5)(B) (the $1.75 per passenger fee). This additional information is necessary to enable CBP to properly account for the fees now provided for under section 58c(a)(5).

CHANGES BASED ON THE TARIFF SUSPENSION AND TRADE ACT OF 2000

The NPRM proposed amendments to §§ 24.22(b)(4)(iv) and 24.22(g)(1) of the Customs Regulations to conform the regulations to a statutory amendment regarding ferries. Section 1457 of the Tariff Suspension and Trade Act of 2000 amended section 58c(b)(1)(A)(iii) to provide an exception to the fee limitation relative to ferries. Prior to this amendment, ferries were excepted from application of the fees under section 58c(a). While this amendment was self-effectuating, effective on November 24, 2000, making ferries commencing operations on or after August 1, 1999, and operating south of 27 degrees latitude and east of 89 degrees longitude subject to the commercial vessel fee of section 58c(a)(1) (and § 24.22(b)(1)) (pro-

vided the ferry is of 100 net tons or more) and the $1.75 commercial vessel passenger fee of section 58c(a)(5)(B), the NPRM proposed to set forth the statutory requirement in the Customs Regulations.

CHANGES BASED ON OTHER STATUTORY PROVISIONS

The NPRM also proposed to amend § 24.22(g) to cover the fee exemption provision set forth in section 58c(b)(1)(A)(iv) and the "one-time only fee" set forth in section 58c(b)(4)(B). These two statutory provisions are not reflected in the current regulation.

The fee exemption provision under section 58c(b)(1)(A)(iv) provides that no fee under section 58c(a)(5) applies to passengers arriving aboard commercial vessels traveling only between ports that are within the customs territory of the United States. The one-time only fee provision of section 58c(b)(4)(B) applies where a fee under section 58c(a)(5) is applicable to passengers arriving aboard a commercial vessel and the voyage is a single voyage involving two or more United States ports. In other words, if a vessel proceeds coastwise to one or more United States ports after its initial arrival from a place outside the United States, the applicable fee is charged only once for each passenger.

The NPRM also proposed to amend § 24.22(g) in order to reflect in § 24.22(g)(1)(iii) the definition of the term "adjacent islands" set forth in 8 U.S.C. 1101(b)(5). Under section 58c(b)(1)(A)(i)(I)(dd), the term "adjacent islands" is given meaning by reference to 8 U.S.C. 1101(b)(5).

CHANGES REGARDING ADMINISTRATIVE PRACTICES

The NPRM proposed to amend various provisions of the regulation to reflect current fee payment and other practices, including clarification of the proper addresses for the mailing of payments, requirements for obtaining and using the user fee decal, and use of electronic and credit card payment options. These amendments were proposed for the following sections of the regulation: § 24.22(b)(3) which concerns the procedure for prepayment of the fee for the arrival of commercial vessels (that is, vessels of 100 net tons or more as well as barges and other bulk carriers arriving from Canada or Mexico); § 24.22(c)(3) which concerns the procedure for prepayment of the fee for the arrival of commercial vehicles; § 24.22(d) which concerns the fee for the arrival of railroad cars and includes, in paragraph (d)(3), procedures for prepayment of the fee and, in paragraph (d)(4)(ii), procedures for monthly statement filing and fee remittance; § 24.22(e)(1) and (2), which concern, respectively, payment of the fee at the time of arrival of private vessels and private aircraft and prepayment of the fee; § 22.24(g)(4) which covers the procedure for payment of fees for the arrival of passengers aboard commercial vessels and commercial aircraft; § 24.22(h) which concerns the annual customs broker permit fee; and § 24.22(i) which concerns pro-

cedures for remittance of, and for submitting information relative to, the fees provided for under § 24.22.

CHANGES TO MAKE A TECHNICAL CORRECTION

The NPRM proposed to correct several erroneous references to § 142.13(c) (19 CFR 142.13(c)) found in paragraphs (a), (c)(2), and (d) of § 24.25, which pertains to statement processing and automated clearinghouse procedures. Section 142.13(c) is currently reserved, and the reference in the above paragraphs of § 24.25 should instead be to § 142.13(b), which pertains to special classes of merchandise.

CONFORMING CHANGES TO PART 111

Lastly, the NPRM proposed to amend certain sections of Part 111 of the Customs Regulations (19 CFR Part 111) which pertains to customs brokers. Specifically, it was proposed to amend §§ 111.19 and 111.96 to conform to the change made to § 24.22(h) referred to above and to clarify the payment procedure in connection with a national customs broker permit application. In §§ 111.19 and 111.96, there are references to the payment of the annual customs broker permit user fee referred to in § 24.22(h).

COMMENTS

One comment was received in response to the NPRM.

Comment:

The commenter recommended the removal from the regulations of the exception found under § 24.22(e)(3)(i) which excepts private vessels less than 30 feet in length (and not carrying any goods that must be declared to CBP) from the fee imposed on private vessels under § 24.22(e)(1). The commenter based the recommendation on the grounds that the regulations require that all private vessels, regardless of tonnage or length, must report their arrival in the United States (see § 123.1(c)) and thus these vessels, including those under 30 feet in length, should not be exempt from the fee.

CBP response:

CBP, at this time, is not adopting the commenter's recommendation to remove from the regulations the fee exception for private vessels of less than 30 feet in length. These vessels have been excepted from the fee because CBP incurred no processing costs in clearing them. Now, however, CBP requires the operators of these vessels to call when they arrive but does not inspect all of them. CBP will evaluate the matter and consider whether the exception should be retained, removed, or modified.

CONCLUSION

Based on analysis of the comment received and further review of the matter, CBP believes that the proposed regulatory amendments should be adopted without change.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a Asignificant regulatory action as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

This amendment to the Customs Regulations will conform the regulations to already enacted statutory provisions concerning the collection of fees and will enhance the efficiency of the fee payment and collection process to the advantage of the public. Thus, it is certified, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that the regulatory amendments set forth in this document will not have a significant economic impact on a substantial number of small entities. Moreover, the new reporting requirements in this document impose an insignificant amount of additional annual burden on small businesses. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collections of information contained in § 24.22 have previously been approved by the Office of Management and Budget (OMB) under OMB control number 1515–0154 (User Fees). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information that lacks a valid control number.

The collections of information in this final rule are in § 24.22(g)(5)(iv) and (v), pertaining to information required in the statement that must accompany a quarterly fee payment relative to passenger fees. This information is necessary to allow CBP to track and account for the two passenger fees mandated in the Miscellaneous Trade and Technical Corrections Act of 1999. These collections of information are mandatory. The likely respondents and recordkeepers are small businesses or organizations.

The estimated average annual burden associated with the collections of information in this final rule is four hours per respondent/recordkeeper.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the OMB, Attention: Desk Officer for the Department of Homeland Security/Bureau of Customs and Border Protection, Office of Information and Regulatory Affairs, Washington, D.C., 20503. A copy should also be

sent to the Regulations Branch, Office of Regulations and Rulings, Customs and Border Protection, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, Customs and Border Protection. Other personnel contributed in its development.

LIST OF SUBJECTS

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Fees, Financial and accounting procedures, Imports, Taxes, User fees.

19 CFR Part 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Imports, Licensing.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, Parts 24 and 111 of the Customs Regulations (19 CFR Parts 24 and 111) are amended as follows:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for part 24 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1505, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 9701.

* * * * * * *

2. Section 24.22 of the regulations is amended by:

a. Revising paragraphs (b)(3), (b)(4)(iv), and (c)(3);

b. In paragraph (d), revising the second sentence of paragraph (d)(3), adding a new sentence at the end of paragraph (d)(4)(ii), and, in the last sentence of paragraph (d)(5), removing the words ", in accordance with the procedures set forth in paragraph (i)(2) of this section";

c. Revising paragraphs (e)(1) and (e)(2);

d. In paragraph (g), revising paragraph (g)(1), redesignating paragraphs (g)(2) through (g)(7) as (g)(3) through (g)(8), adding new paragraph (g)(2), revising newly designated paragraphs (g)(3), (g)(4), and (g)(5), and, at the end of the last sentence of newly designated para-

graph (g)(7), removing the words ", in accordance with the procedures set forth in paragraph (i)(2) of this section"; and

e. Revising paragraphs (h) and (i).

The revisions read as follows:

§ 24.22 Fees for certain services.

* * * * * * *

(b) * * *

(3) *Prepayment.* The vessel operator, owner, or agent may at any time prepay the maximum calendar year amount specified in paragraph (b)(1)(ii) or (b)(2)(ii) of this section, or any remaining portion of that amount if individual arrival fees have already been paid on the vessel for that calendar year. Prepayment must be made at a CBP port office. When prepayment is for the remaining portion of a maximum calendar year amount, certified copies of receipts (Customs Form 368 or 368A) issued for individual arrival fee payments during the calendar year must accompany the payment.

(4) *Exceptions.* * * *

(iv) A ferry except for a ferry that began operations on or after August 1, 1999, and operates south of 27 degrees latitude and east of 89 degrees longitude.

(c) * * *

(3) *Prepayment.* The owner, agent, or person in charge of a commercial vehicle may at any time prepay a fee of $100 to cover all arrivals of that vehicle during a calendar year or any remaining portion of a calendar year. Prepayment must be made in accordance with the procedures set forth in this paragraph and paragraph (i) of this section. Prepayment may be sent by mail, with a properly completed Customs Form 339, Annual User Fee Decal Request, to the following address: Bureau of Customs and Border Protection, Decal Program Administrator, P.O. Box 382030, Pittsburgh, PA 15250–8030. Alternatively, the decal request and prepayment by credit card may be made via the Internet through the "Traveler Information" links at CBP's website (*http://www.cbp.gov*). A third option, prepayment at the port, is subject to the port director's discretion to maintain user fee decal inventories. Once the prepayment has been made under this paragraph, a decal will be issued to be permanently affixed by adhesive to the lower left hand corner of the vehicle windshield or on the left wing window, and otherwise in accordance with the accompanying instructions, to show that the vehicle is exempt from payment of the fee for individual arrivals during the applicable calendar year or any remaining portion of that year.

(d) * * *

(3) *Prepayment.* * * * The prepayment, accompanied by a letter setting forth the railroad car number(s) covered by the payment, the calendar year to which the payment applies, a return address, and any additional information required under paragraph (i) of this sec-

tion, must be mailed to: Customs and Border Protection, National Finance Center, Collections Section, P.O. Box 68907, Indianapolis, IN 46268 (or, if for overnight delivery, to: the same addressee at 6026 Lakeside Blvd., Indianapolis, IN 46278).

(4) *Statement filing and payment procedures.* * * *

(ii) * * * Payment must be made in accordance with this paragraph and paragraph (i) of this section and must be sent by mail to the following address: Customs and Border Protection, National Finance Center, Collections Section, P.O. Box 68907, Indianapolis, IN 46268 (or, if for overnight delivery, to: the same addressee at 6026 Lakeside Blvd., Indianapolis, IN 46278).

* * * * * * *

(e) *Fee for arrival of a private vessel or private aircraft.*

(1) *Fee.* Except as provided in paragraph (e)(3) of this section, the master or other person in charge of a private vessel or private aircraft must, upon first arrival in any calendar year, proceed to CBP and tender the sum of $25 to cover services provided in connection with all arrivals of that vessel or aircraft during that calendar year. A properly completed Customs Form 339, Annual User Fee Decal Request, must accompany the payment. Upon payment of the annual fee, a decal will be issued to be permanently affixed by adhesive to the vessel or aircraft, in accordance with accompanying instructions, as evidence that the fee has been paid. Except in the case of private aircraft, and aircraft landing at user fee airports authorized under 19 U.S.C. 58b, all overtime charges provided for in this part remain payable notwithstanding payment of the fee specified in this paragraph.

(2) *Prepayment.* A private vessel or private aircraft owner or operator may, at any time during the calendar year, prepay the $25 annual fee specified in paragraph (e)(1) of this section. Prepayment must be made in accordance with the procedures set forth in this paragraph and paragraph (i) of this section. Prepayment may be sent by mail, along with a properly completed Customs Form 339, Annual User Fee Decal Request, to the following address: Customs and Border Protection, Decal Program Administrator, P.O. Box 382030, Pittsburgh, PA 15250–8030. Alternatively, the decal request and prepayment by credit card may be made via the Internet through the "Traveler Information" links at CBP's website (*http://www.cbp.gov*). A third option, prepayment at the port, is subject to the port director's discretion to maintain user fee decal inventories.

* * * * * * *

(g) *Fees for arrival of passengers aboard commercial vessels and commercial aircraft.*

(1) *Fees.* (i) Subject to paragraphs (g)(1)(ii) and (g)(3) of this section, a fee of $5 must be collected and remitted to CBP for services provided in connection with the arrival of each passenger aboard a

commercial vessel or commercial aircraft from a place outside the United States, other than Canada, Mexico, one of the territories and possessions of the United States, or one of the adjacent islands, in either of the following circumstances:

(A) When the journey of the arriving passenger originates in a place outside the United States other than Canada, Mexico, one of the territories or possessions of the United States, or one of the adjacent islands; or

(B) When the journey of the arriving passenger originates in the United States and is not limited to Canada, Mexico, territories and possessions of the United States, and adjacent islands.

(ii) Subject to paragraph (g)(3) of this section, a fee of $1.75 must be collected and remitted to Customs for services provided in connection with the arrival of each passenger aboard a commercial vessel from Canada, Mexico, one of the territories and possessions of the United States, or one of the adjacent islands, regardless of whether the journey of the arriving passenger originates in a place outside the United States or in the United States.

(iii) For purposes of this paragraph (g), the term "territories and possessions of the United States" includes American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, and the term "adjacent islands" includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.

(iv) For purposes of this paragraph (g), a journey, which may encompass multiple destinations and more than one mode of transportation, will be deemed to originate in the location where the person's travel begins under cover of a transaction which includes the issuance of a ticket or travel document for transportation into the customs territory of the United States.

(v) For purposes of this paragraph (g), the term "passenger" means a natural person for whom transportation is provided and includes an infant whether a separate ticket or travel document is issued for the infant or the infant occupies a seat or is held or carried by another passenger.

(vi) For purposes of paragraph (g)(1)(ii) of this section, the term "commercial vessel" includes any ferry that began operations on or after August 1, 1999, and operates south of 27 degrees latitude and east of 89 degrees longitude.

(vii) In the case of a commercial vessel making a single voyage involving two or more United States ports, the applicable fee prescribed under paragraph (g)(1)(i) or (g)(1)(ii) of this section is required to be charged only one time for each passenger.

(2) *Fee chart.* The chart set forth below outlines the application of the fees specified in paragraphs (g)(1)(i) and (ii) of this section

with reference to the place where the passenger's journey originates and with reference to the place from which the passenger arrives in the United States (that is, the last stop on the journey prior to arrival in the United States). In the chart:

(i) SL stands for "Specified Location" and means Canada, Mexico, any territories and possessions of the United States, and any adjacent islands;

(ii) The single asterisk (*) means that the journey originating in the United States is limited to travel to one or more Specified Locations;

(iii) The double asterisk (**) means that the journey originating in the United States includes travel to at least one place other than a Specified Location; and

(iv) N/A indicates that the facts presented in the chart preclude application of the fee.

Place Where Journey Originates (see (g)(1)(iv)):	Fee Status for Arrival From SL:		Fee Status for Arrival From Other Than SL:	
	Vessel	Aircraft	Vessel	Aircraft
SL	$1.75	No fee	No fee	No fee
Other than SL or U.S.	$1.75	No fee	$5	$5
U.S.*	$1.75	No fee	N/A	N/A
U.S.**	$1.75	No fee	$5	$5

(3) *Exceptions.* The fees specified in paragraph (g)(1) of this section will not apply to the following categories of arriving passengers:

(i) Crew members and persons directly connected with the operation, navigation, ownership or business of the vessel or aircraft, provided that the crew member or other person is traveling for an official business purpose and not for pleasure;

(ii) Diplomats and other persons in possession of a visa issued by the United States Department of State in class A–1, A–2, C–2, C–3, G–1 through G–4, or NATO 1–6;

(iii) Persons arriving as passengers on any aircraft used exclusively in the governmental service of the United States or a foreign government, including any agency or political subdivision of the United States or foreign government, so long as the aircraft is not carrying persons or merchandise for commercial purposes. Passengers on commercial aircraft under contract to the U.S. Department of Defense are exempted if they have been precleared abroad under the joint DOD/CBP Military Inspection Program;

(iv) Persons arriving on an aircraft due to an emergency or forced landing when the original destination of the aircraft was a foreign airport;

(v) Persons who are in transit to a destination outside the

United States and for whom CBP inspectional services are not provided;

(vi) Persons departing from and returning to the same United States port as passengers on board the same vessel without having touched a foreign port or place; and

(vii) Persons arriving as passengers on board a commercial vessel traveling only between ports that are within the customs territory of the United States.

(4) *Fee collection procedures.* (i) Each air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document for transportation into the customs territory of the United States is responsible for collecting from the passenger the applicable fee specified in paragraph (g)(1) of this section, including the fee applicable to any infant traveling without a separate ticket or travel document. The fee must be separately identified with a notation "Federal inspection fees" on the ticket or travel document issued to the passenger to indicate that the required fee has been collected. A fee relative to an infant traveling without a ticket or travel document may be identified instead with the notation on a receipt or other document issued for that purpose or to record the infant's travel. If the ticket or travel document, or a receipt or other document issued relative to an infant traveling without a ticket or travel document, is not so marked and was issued in a foreign country, the fee must be collected by the departing carrier upon departure of the passenger from the United States. If the fee is collected at the time of departure from the United States, the carrier making the collection must issue a receipt to the passenger. U.S.-based tour wholesalers who contract for passenger space and issue non-carrier tickets or travel documents must collect the fee in the same manner as a carrier.

(ii) Collection of the fee under paragraph (g)(1)(i) of this section will include the following circumstances:

(A) When a through ticket or travel document is issued covering (or a receipt or other document issued for an infant traveling without a ticket or travel document indicates that the infant's journey is covering) a journey into the customs territory of the United States which originates in and arrives from a place outside the United States other than Canada, Mexico, one of the territories and possessions of the United States, or an adjacent island;

(B) When a return ticket or travel document is issued (or a receipt or other document that indicates an infant traveling without a return ticket or travel document is issued) in connection with a journey which originates in the United States, includes a stop in a place other than Canada, Mexico, one of the territories and possessions of the United States, or an adjacent island, and the return arrival to the United States is from a place other than one of these specified places; and

(C) When a passenger on a journey in transit through the United States to a foreign destination arrives in the customs territory of the United States from a place other than Canada, Mexico, one of the territories and possessions of the United States, or an adjacent island, is processed by CBP, and the journey does not originate in one of these specified places.

(iii) Collection of the fee under paragraph (g)(1)(ii) of this section will include the following circumstances:

(A) When a through ticket or travel document is issued covering (or a receipt or other document issued for an infant traveling without a ticket or travel document indicates that the infant's journey is covering) a journey into the customs territory of the United States from Canada, Mexico, one of the territories and possessions of the United States, or an adjacent island;

(B) When a return ticket or travel document is issued (or a receipt or other document that indicates an infant traveling without a return ticket or travel document is issued) in connection with a journey which originates in the United States and the return arrival to the United States is from Canada, Mexico, one of the territories and possessions of the United States, or an adjacent island; and

(C) When a passenger on a journey in transit through the United States to a foreign destination arrives in the customs territory of the United States from Canada, Mexico, one of the territories and possessions of the United States, or an adjacent island and is processed by CBP.

(5) *Quarterly payment and statement procedures.* Payment to CBP of the fees required to be collected under paragraph (g)(1) of this section must be made no later than 31 days after the close of the calendar quarter in which the fees were required to be collected from the passenger. Payment of the fees must be made, in accordance with the procedures set forth in this paragraph and paragraph (i) of this section, by the party required to collect the fee under paragraph (g)(4)(1) of this section. Each quarterly fee payment must be sent to the following address: Customs and Border Protection, National Finance Center, Collections Section, P.O. Box 68907, Indianapolis, IN 46268 (or, if for overnight delivery, to: the same addressee at 6026 Lakeside Blvd., Indianapolis, IN 46278). Overpayments and underpayments may be accounted for by an explanation with, and adjustment of, the next due quarterly payment to CBP. The quarterly payment must be accompanied by a statement that includes the following information:

(i) The name and address of the party remitting payment;

(ii) The taxpayer identification number of the party remitting payment;

(iii) The calendar quarter covered by the payment;

(iv) The total number of tickets for which fees were required to be collected, the total number of infants traveling without a ticket

or travel document for which fees were required to be collected, and the total amount of fees collected and remitted; and

(v) For commercial vessel passengers, the total number of tickets for which fees were required to be collected, the total number of infants traveling without a ticket or travel document for which fees were required to be collected, the total amount of fees collected and remitted to CBP, and a separate breakdown of the foregoing information relative to the $5 vessel passenger fee collected and remitted under paragraph (g)(1)(i) of this section and the $1.75 vessel passenger fee collected and remitted under paragraph (g)(1)(ii) of this section.

* * * * * * *

(h) *Annual customs broker permit fee.* Customs brokers are subject to an annual fee for each district permit and for a national permit held by an individual, partnership, association, or corporation, as provided in § 111.96(c) of this chapter. The annual fee for each district permit must be submitted to the port through which the broker was granted the permit. The annual fee for a national permit must be submitted to the port through which the broker's license is delivered.

(i) *Information submission and fee remittance procedures.* In addition to any information specified elsewhere in this section, each payment made by mail must be accompanied by information identifying the person or organization remitting the fee, the type of fee being remitted (for example, railroad car, commercial truck, private vessel), and the time period to which the payment applies. All fee payments required under this section must be in the amounts prescribed and must be made in U.S. currency, or by check or money order payable to Customs and Border Protection, in accordance with the provisions of § 24.1 of this part. Authorization for making payments electronically can be obtained by writing to the National Finance Center, Collections Section, 6026 Lakeside Blvd., Indianapolis, IN 46278. Where payment is made at a CBP port, credit cards will be accepted only where the port is equipped to accept credit cards for the type of payment being made. If payment is made by check or money order, the check or money order must be annotated with the appropriate class code. The applicable class codes and payment locations for each fee are as follows:

(1) Fee under paragraph (b)(1) of this section (commercial vessels of 100 net tons or more other than barges and other bulk carriers from Canada or Mexico): class code 491. Payment location: port of arrival for each individual arrival (fee to be collected by CBP at the time of arrival) or prepayment at the port in accordance with paragraph (b)(3) of this section;

(2) Fee under paragraph (b)(2) of this section (barges and other bulk carriers from Canada or Mexico): class code 498. Payment location: port of arrival for each individual arrival (fee to be collected by

CBP at the time of arrival) or prepayment at the port in accordance with paragraph (b)(3) of this section;

(3) Fee under paragraph (c) of this section (commercial vehicles): for each individual arrival, class code 492; for prepayment of the maximum calendar year fee, class code 902. Payment location: port of arrival for each individual arrival (fee to be collected by CBP at the time of arrival) or prepayment in accordance with paragraph (c)(3) of this section;

(4) Fee under paragraph (d) of this section (railroad cars): for each individual arrival (under the monthly payment and statement filing procedure), class code 493; for prepayment of the maximum calendar year fee, class code 903. Payment location: for individual arrivals (monthly payment and statement filing), see paragraph (d)(4)(ii) of this section; for prepayment, see paragraph (d)(3) of this section;

(5) Fee under paragraph (e) of this section (private vessels and aircraft): for private vessels, class code 904; for private aircraft, class code 494. Payment location: port of arrival for each individual arrival (fee to be collected by CBP at the time of arrival) or prepayment in accordance with paragraph (e)(2) of this section;

(6) Fee under paragraph (f) of this section (dutiable mail): class code 496. Payment location: see paragraph (f) of this section;

(7) Fee under paragraph (g)(1)(i) of this section (the $5 fee for commercial vessel and commercial aircraft passengers): class code 495. Payment location: see paragraph (g)(5) of this section;

(8) Fee under paragraph (g)(1)(ii) of this section (the $1.75 fee for commercial vessel passengers): class code 484. Payment location: see paragraph (g)(5) of this section; and

(9) Fee under paragraph (h) of this section (customs broker permits): for district permits, class code 497; for national permits, class code 997. Payment location: see paragraph (h) of this section.

* * * * * * *

3. Paragraphs (a), (c)(2), and (d) of § 24.25 are amended by removing the reference "§ 142.13(c)" wherever it appears and adding, in its place, the reference "§ 142.13(b)".

PART 111—CUSTOMS BROKERS

4. The authority citation for Part 111 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202, (General Note 23, Harmonized Tariff Schedule of the United States), 1624, 1641.

* * * * * * *

Section 111.96 also issued under 19 U.S.C. 58c; 31 U.S.C. 9701.

5. Section 111.19 is amended by revising paragraphs (c) and (f)(4) to read as follows:

§ 111.19 Permits

* * * * * * *

(c) *Fees.* Each application for a district permit under paragraph (b) of this section must be accompanied by the $100 and $125 fees specified in §§ 111.96(b) and (c). In the case of an application for a national permit under paragraph (f) of this section, the $100 fee specified in § 111.96(b) and the $125 fee specified in § 111.96(c) must be paid at the port through which the applicant's license was delivered (see § 111.15) prior to submission of the application. The $125 fee specified in § 111.96(c) also must be paid in connection with the issuance of an initial district permit concurrently with the issuance of a license under paragraph (a) of this section.

* * * * * * *

(f) *National permit.* * * *

(4) Attach a receipt or other evidence showing that the fees specified in § 111.96(b) and (c) have been paid in accordance with paragraph (c) of this section.

* * * * * * *

6. Section 111.96 is amended by revising paragraph (b); in paragraph (c), by removing from the second sentence the words "or upon filing the application for the" and adding in their place the words "or in connection with the filing of an application for a"; and by removing from the same sentence the reference "§ 111.19(f)(4)" and adding in its place "§ 111.19(c)". The revision reads as follows:

§ 111.96 Fees.

* * * * * * *

(b) *Permit fee.* A fee of $100 must be paid in connection with each permit application under § 111.19 to defray the costs of processing the application, including an application for reinstatement of a permit that was revoked by operation of law or otherwise.

* * * * * * *

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

Approved: July 21, 2003

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 24, 2003 (43624)]

8 CFR PARTS 212, 214, 231 and 233

(CBP DEC. 03–14)

RIN 1515–AD36

SUSPENSION OF IMMEDIATE AND CONTINUOUS TRANSIT PROGRAMS

AGENCY: Department of Homeland Security.

ACTION: Interim rule with request for comments.

SUMMARY: The Immediate and Continuous Transit program, also known as the Transit Without Visa (TWOV) program and the International-to-International (ITI) program allow an alien to be transported in-transit through the United States to another foreign country without first obtaining a nonimmigrant visa from the Department of State overseas, under section 212(d)(4) of the Immigration and Nationality Act (Act), provided the carrier has entered into an Immediate and Continuous Transit Agreement on Form I–426, pursuant to section 233(c) of the Act. This rule suspends immediate and continuous transit provisions for both the TWOV and ITI programs. The current regulations provide that an alien may be transported through the United States in accordance with the provisions of section 233(c) of the Act. The recent receipt of credible intelligence concerning a threat specific to the TWOV program and additional increased threats of activities against the interests and the security of the United States, has led to the decision to suspend this program.

DATES: This interim rule is effective August 2, 2003; written comments must be submitted on or before September 22, 2003.

ADDRESSES: Written comments are to be addressed to the Bureau of Customs and Border Protection, Office of Regulations and Rulings, Regulations Branch, 1300 Pennsylvania Avenue, NW, Washington, DC 20229. Submitted comments may be inspected at the Bureau of Customs and Border Protection at 799 9th Street, NW, Washington, DC 20229. Comments are available for public inspection at the above address by calling (202) 572–8768 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Kenneth Sava, Director, Air and Sea Passenger Operations, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW, Room 5.4–0, Washington, DC 20229, telephone number (202) 927–0530.

SUPPLEMENTARY INFORMATION:

WHAT ARE THE TWOV AND ITI PROGRAMS?

The Transit Without Visa (TWOV) and International-to-International (ITI) programs were established under authority now

vested with the Secretary of Homeland Security (and since delegated to the Commissioner, Customs and Border Protection (CBP)) in 8 U.S.C. 1182(d)(4) and 1223, among other authorities. *See also*, 6 U.S.C. 251(5) (transfer of former Immigration and Naturalization Service (INS) inspection functions to DHS); Department of Homeland Security Reorganization Plan of January 30, 2003, (transfer of former INS inspection functions to Commissioner of Customs, renamed Bureau of Customs and Border Protection), H.R. Doc. 108–32 (2003).

The TWOV and ITI programs allow aliens to transit through the United States without a nonimmigrant visa while en route from one foreign country to a second foreign country with one or more stops in the United States. Air carriers who enter into the TWOV or both the TWOV and lTl agreements, depending on the circumstances, transport these aliens to the United States.

WHAT IS THE AUTHORITY FOR PARTICIPATION IN THE TWOV AND ITI PROGRAM?

Section 212(d)(4)(C) of the Immigration and Nationality Act (Act) provides authority for the Secretary of Homeland Security acting jointly with the Secretary of State to waive nonimmigrant visa requirements for aliens who are proceeding in immediate and continuous transit through the United States and are using a carrier which has entered into a contract authorized under section 233(c) of the Act. The required contract for participation in the TWOV program is an Immediate and Continuous Transit Agreement, Form I–426 (known as a TWOV Agreement). The required contracts for participation in the ITI program are (1) a TWOV Agreement and (2) an Immediate and Continuous Transit Agreement with provisions for use of an In-Transit Lounge (known as an ITI Agreement).

WHY IS DHS SUSPENDING THE IMMEDIATE AND CONTINUOUS TRANSIT PROVISIONS?

In light of the importance of preventing terrorist acts, and as set forth in Executive Order No. 13284 of January 23, 2003, 68 Fed. Reg. 4075, that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, pose an immediate threat of further attacks on United States nationals or the United States and constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, it is necessary to suspend the TWOV and ITI programs to protect the security interests of the United States. By this interim rule, the Secretaries of State and Homeland Security will immediately suspend the TWOV and ITI programs

while they evaluate the security risks involved in these programs over the next 60 days.

The provisions for aliens eligible for the TWOV program preclude prescreening of passengers prior to their arrival at a port of entry in the United States, by permitting the waiver of nonimmigrant visa requirements for such persons. Accordingly, such provisions shall be suspended immediately to safeguard the interests of the United States by controlling the entry or attempted entry of persons transiting through the United States. Suspension of these provisions will require aliens in immediate and continuous transit to be in possession of valid nonimmigrant visas unless such a requirement is otherwise waived. DHS has established procedures for the handling of passengers in transit to the United States when this rule takes effect and will be working with carriers to minimize disruption.

The suspension of these regulations does not preclude the use of ITI lounges for any other authorized purpose. Foreign government officials may continue to transit the United States pursuant to 8 C.F.R. 212.1(f)(3). During the 60 day review period, DHS will be working with the airlines, airports, foreign governments, and others to develop plans that will ensure security, as well as reviewing comments submitted in conjunction this interim rule.

DHS and the Department of State have received specific, credible intelligence, including from intelligence and law enforcement sources, including the Central Intelligence Agency (CIA) and Federal Bureau of Investigation (FBI), that certain terrorist organizations have identified this exemption from the normal visa issuance procedures as a means to gain access to the United States, or to gain access to aircraft en route to or from the United States, to cause damage to infrastructure, injury, or loss of life in the United States or on board aircraft en route to or from the United States.

Due to this credible security threat, it is necessary to implement certain measures to restrict the transit of aliens through the United States. The waiver of visa requirements for aliens in the TWOV program precludes prescreening of passengers prior to their arrival at a port of entry in the United States. Accordingly, such provisions are suspended immediately to safeguard the national security interest of the United States by restricting the transit of such persons.

The Secretaries of State and Homeland Security may waive passport and visa requirements for certain categories of non-immigrants jointly. These regulations are promulgated jointly with the Secretary of State.

COMMENTS

Consideration will be given to any written comments timely submitted. The shortened comment period of 45 days is necessary to receive and consider comments prior to DHS reevaluation of this suspension in 60 days.

ADMINISTRATIVE PROCEDURES ACT

The immediate implementation of this rule as an interim rule, with a 45-day provision for post-promulgation public comments, is based on findings of "good cause" pursuant to 5 U.S.C. 553(b) and 553(d)(3). Making the effective date of this rule on the date of signature is necessary for the national security of the United States and to prevent the TWOV and ITI programs from being used to conduct terrorist acts against the United States.

DHS has received credible intelligence that certain terrorist organizations have identified this exemption from the normal visa issuance procedures as a means to gain access to the United States or an aircraft en route to the United States to cause serious damage, injury, or death in the United States. Due to this credible security threat, it is necessary to implement measures immediately to control the entry of persons arriving in the United States.

For these reasons, there is substantial basis for concern that prior publication of a proposed rule for public comment, and the requirement for a 30 day delayed effective date after publication of a final rule, would leave the United States seriously and unnecessarily vulnerable to a specific terrorist threat against persons in the United States during the period of time before the final rule could become effective after the end of the public comment period and the further 30-day delay.

Accordingly, DHS has determined that prior notice and public comment on this rule, and a delay in the effective date, would be impracticable and contrary to the public interest. Moreover, DHS is making this rule effective upon signature, prior to publication in the Federal Register, in view of the urgency of the threats posed to the public safety and security of the United States. Upon signature, DHS will provide actual notice of the suspension of the TWOV and ITI programs to all affected air carriers, and has also provided widespread publicity of this change to the traveling public. Accordingly, there is good cause to publish this interim rule and to make it effective upon its signature. DHS welcomes post-promulgation public comment on this interim rule.

REGULATORY FLEXIBILITY ACT

Since this document is not subject to the prior notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*).

PAPERWORK REDUCTION ACT

This interim final rule will not impose additional reporting or record-keeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

EXECUTIVE ORDER 12866

This rule is considered by the Department of Homeland Security to be a significant regulatory action under Executive Order 12866, section 3(f), Regulatory Planning and Review. The Department, however, concludes at this time that this regulatory action is not economically significant under section 3(f)(1), and specifically requests comments regarding this determination. Accordingly, this regulation has been submitted to the Office of Management and Budget (OMB) for review.

DHS has assessed both the costs and benefits of this rule, as required by Executive Order 12886, section 3(f), and has made a reasoned determination that the benefits justify the costs. Suspending the Transit Without Visa program will safeguard the homeland security interests of the United States by controlling the entry of persons permitted to travel to and through the United States. DHS and the Department of State have received credible intelligence that certain terrorist organizations have identified this exemption from the normal visa issuance procedures to gain access to the United States or an aircraft en route to the United States to cause injury to United States infrastructure or its citizens. We cannot at this time present any quantifiable information regarding this threat.

Costs include the potential for lost airline revenue for those air carriers who have historically carried Transit Without Visa passengers. The air carriers transported 381,065 TWOV passengers and 233,434 ITI passengers to the United States in fiscal year 2002. For the purposes of this analysis, CBP assumes an average price per flight of $800 for TWOV passengers, and requests comments on this assumption. Therefore, the total revenue the airlines earn for from these passengers is approximately $300 million per year. With this program suspended, passengers that would otherwise be able to travel through the United States without visas would now be required to obtain visas, which may result in some travelers re-routing their trips away from the United States and fewer travelers transiting through the United States. The re-routing may affect demand for travel on U.S. airlines versus foreign airlines. The diminished number of travelers transiting the United States may also adversely affect retail businesses at certain airports. Note that DHS does not at this time know for how long this program will be suspended, and therefore what fraction of this yearly revenue may be affected by any activity attributable to this rulemaking. This rule calls for a suspension and 60 day review and possible permanent modifications to the program. When DHS has determined the possible permanent impact of these modifications, we will reassess all assumptions and estimations regarding costs.

For the purposes of the Executive Order, costs also include the lost consumer surplus of passengers participating in the TWOV program. This impact, however, depends crucially on the price elasticity

of TWOV program flights and the characteristics of reasonable substitutes for these flights, such as obtaining a visa for an otherwise identical itinerary, switching travel out of the United States, or not traveling at all. This cost should be bounded by the time and convenience of obtaining a visa for an otherwise identical flight, which is a viable alternative for these passengers. Currently, the State Department charges approximately $100 per visa application. Without quantifying convenience costs, if passengers simply obtained a visa and did not otherwise alter their flight plans, the cost of the rule to passengers would be approximately $40 million per year. Again, DHS does not know for how long this program will be suspended. Note that this would also be the total cost of the rule, since airlines would not lose any of their revenue under this scenario. We encourage the submission of comments further quantifying the potential economic impact.

EXECUTIVE ORDER 13132: FEDERALISM

The interim final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

LIST OF SUBJECTS

8 CFR Part 212

Administrative practice and procedure, Aliens, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Reporting and record keeping requirements.

8 CFR Part 231

Air carriers, Aliens, Maritime carriers, Reporting and recordkeeping requirements.

8 CFR Part 233

Air carriers, Aliens, Maritime carriers, Reporting and recordkeeping requirements.

AMENDMENT OF THE REGULATIONS

Accordingly, chapter 1 of title 8 of the Code of Federal Regulations is amended as follows:

PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

1. The authority citation for part 212 is revised to read as follows:
Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227.
2. The text of Section 212.1 paragraphs (f)(1) through (f)(2) are removed and reserved.

PART 214—NONIMMIGRANT CLASSES

3. The authority citation for part 214 continues to read as follows:
Authority: 8 U.S.C. 1101, 1102, 1103, 1162, 1182, 1184, 1186a, 1187, 1221, 1223, 1281, 1282, 1301–1305 and 1372; section 643, Pub. L. 104–208, 110 Stat. 3009–708; section 141 of the compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively.
4. In section 214.2, paragraph (c)(1) is removed and reserved.

PART 231—ARRIVAL-DEPARTURE MANIFESTS

5. The authority citation for part 231 is revised to read as follows:
Authority: 8 U.S.C. 1101, 1103, 1182, 1221, 1223 and 1229.
6. In section 231.1, paragraph (b) is removed and reserved.

PART 233—CONTRACTS WITH TRANSPORTATION LINES

7. The authority citation for part 233 is revised to read as follows:
Authority: 8 U.S.C. 1103, 1182, 1223.
8. Section 233.3 is removed and reserved.

TOM RIDGE,
Secretary of Homeland Security.

Dated: August 2, 2003

[Published in the Federal Register, August 7, 2003, (46926)]

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19 CFR PART 111

(CBP Dec. 03–15)

RIN 1515–AD14

PERFORMANCE OF CUSTOMS BUSINESS BY PARENT AND SUBSIDIARY CORPORATIONS

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, proposed amendments to the Customs Regulations to provide that corporate compliance activity engaged in by related business entities for the purpose of exercising "reasonable care" is not customs business and therefore is not subject to the customs broker licensing requirements. The amendments make clear that this corporate compliance activity concept does not extend to document preparation and filing, which is customs business subject to licensing requirements. The amendments will improve the operational efficiency of the affected business entities and, thereby, enhance their ability to ensure compliance with applicable customs laws and regulations.

EFFECTIVE DATE: Final rule effective September 10, 2003.

FOR FURTHER INFORMATION CONTACT: Gina Grier, Office of Regulations and Rulings (202–572–8730).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that a person must hold a valid customs broker's license and permit in order to transact customs business on behalf of others, sets forth standards for the issuance of broker's licenses and permits, provides for disciplinary action against brokers in the form of suspension or revocation of such licenses and permits or assessment of monetary penalties, and provides for the assessment of monetary penalties against other persons for conducting customs business without the required broker's license. Section 641 also provides for the issuance of rules and regulations relating to the customs business of brokers as may be necessary to protect importers and the revenue of the United States and to carry out the provisions of section 641.

The regulations issued under the authority of section 641 are set forth in Part 111 of the Customs Regulations (19 CFR Part 111). Part 111 includes detailed rules regarding the licensing of, and granting of permits to, persons desiring to transact customs business as customs brokers, including the qualifications required of applicants and the procedures for applying for licenses and permits. Part 111 also prescribes recordkeeping and other duties and responsibilities of brokers, sets forth in detail the grounds and procedures for the revocation or suspension of broker licenses and permits and for the assessment of monetary penalties, and sets forth fee payment requirements applicable to brokers under section 641 and 19 U.S.C. 58c(a)(7).

Section 111.1 of the Customs Regulations (19 CFR 111.1) sets forth definitions that apply for purposes of Part 111 and includes the following definition of "customs business:"

> "Customs business" means those activities involving transactions with Customs concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by Customs on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes, or other charges. "Customs business" also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with Customs in furtherance of any other customs business activity, whether or not signed or filed by the preparer. However, "customs business" does not include the mere electronic transmission of data received for transmission to Customs.

Section 111.2 of the Customs Regulations (19 CFR 111.2) sets forth the basic rules regarding when a person (that is, an individual, partnership, association, or corporation) must obtain a customs broker license and permit. Paragraph (a)(2) of § 111.2 specifies several exceptions to the license requirement including, in subparagraph (i), an exception for an importer or exporter (and his authorized regular employees or officers acting only for him) transacting customs business solely on his own account and in no sense on behalf of another. Section 111.4 of the Customs Regulations (19 CFR 111.4) provides that any person who intentionally transacts customs business, other than as provided in § 111.2(a)(2), without holding a valid broker's license, will be liable for a monetary penalty for each such transaction as well as for each violation of any other provision of section 641.

The scope of "customs business" and the broker licensing requirement took on added importance as a result of the amendments made in 1993 by the Customs Modernization Act (the Mod Act) provisions of the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057). Those Mod Act amendments included a revision of section 484 of the Tariff Act of 1930 (19 U.S.C. 1484) to, among other things, add a requirement that an importer of record exercise "reasonable care" in connection with the entry requirements under that section. In order to foster compliance with the customs laws and regulations under this added statutory responsibility, many importer groups consisting of a parent corporation and one or more subsidiary corporations chose to centralize their in-house customs experts into one corporate entity and to make the services of those experts available to the group as a whole.

However, when requested to issue an administrative ruling on the issue, the U.S. Customs Service (Customs, the predecessor agency to

the current Bureau of Customs and Border Protection, referred to hereafter in this document as CBP) consistently took the position that many of the activities performed under this type of arrangement would involve the transaction of "customs business," which would require a broker license under § 111.2(a)(1). This conclusion was based on the reasoning that (1) the parent corporation and each subsidiary corporation is a separate legal "person," and (2) therefore, the parent or subsidiary corporation in which the customs expertise resides would be transacting customs business not solely on its own account as provided under § 111.2(a)(2)(i) but rather on behalf of another "person."

Members of the trade community on a number of occasions had indicated to Customs that the result reached in the administrative rulings described above was unsatisfactory because it did not afford importers sufficient opportunity to address multiple related aspects of an individual customs transaction or groups of transactions. They believed that this was an impediment to their ensuring that reasonable care is exercised by all corporate affiliates for purposes of 19 U.S.C. 1484.

In response to the concerns expressed by the trade, Customs on October 15, 2002, published in the **Federal Register** (67 FR 63576) a notice setting forth proposed amendments to the Customs Regulations that would expand the permissible use of in-house experts by corporations and their affiliates to include activity that is intended to meet the corporation's "reasonable care" obligations under 19 U.S.C. 1484 and that would not fall within the definition of "customs business" in 19 U.S.C. 1641. The proposed amendments involved the addition of a new § 111.1 definition for the term "corporate compliance activity" to describe the permissible activities (and with a specific exclusion for document preparation and filing); the addition of language at the end of the existing § 111.1 definition of "customs business" stating that it does not include a corporate compliance activity; and the addition of a new paragraph (a)(2)(vii) to § 111.2 to clarify that a company performing a corporate compliance activity is not required to be licensed as a broker.

The October 15, 2002, notice invited the submission of public comments on the proposed regulatory changes, and the public comment period closed on December 16, 2002. A total of 28 commenters responded to the solicitation of comments in the notice. The comments submitted are summarized and responded to below.

DISCUSSION OF COMMENTS

Comment:

The proposed amendments will benefit the importing community for several different reasons. For example, divisions and sister subsidiaries will be better able to meet the standards of reasonable care. Similarly, subsidiaries will be able to better leverage and benchmark

best practices from within the parent company and subsidiaries, thereby improving the compliance activities of the entire corporation. Under the proposed rule, centralized corporate or affiliate groups can be more flexible in their ability to hire qualified people to provide common expertise for subsidiary companies that small divisions may not be able to afford or justify by themselves. The commenter provided a number of other examples of the beneficial aspects of this proposed rule.

Response:

CBP agrees in principle with the general nature of these comments which reflect the purpose behind the regulatory proposal.

Comment:

The goal of this proposal, which is to enable related companies to engage in corporate compliance activity on behalf of one another, could best be achieved through the modification or revocation of the rulings which created the controversy in the first place.

Response:

CBP considered but rejected that option because a modification or revocation of those rulings might give rise to a false premise, that is, that the rulings were not legally correct when they were originally issued. To the extent that the rulings in question are inconsistent with the Part 111 texts as amended by this final rule document, those rulings will be considered to be modified or revoked without further action on the part of CBP—see § 177.12(d)(1)(vi) of the Customs Regulations (19 CFR 177.12(d)(1)(vi)) which was adopted in T.D. 02–49, published in the **Federal Register** (67 FR 53483) on August 16, 2002.

Comment:

The proposed new definition of "corporate compliance activity" in § 111.1 is imprecise and will only create confusion. By seeming to allow all activities that do not involve the preparation or filing of documents, the proposed amendment raises concerns that other intercorporate activities set forth in the definition of "customs business" will be allowed.

Response:

CBP does not agree that the definition is imprecise and will create confusion. The commenter has correctly understood the effect of the proposed regulatory amendment, that is, that related companies will be permitted to conduct any activities mentioned in the definition of "customs business," other than the actual preparation and filing of documents, so long as those activities fall within the definition of "corporate compliance activity."

Comment:

It is improper for CBP to include corporate compliance activities in 19 CFR 111.2(a)(2) as an exception to the requirement that a license is required, since it has already been made clear that these activities do not fall within the definition of "customs business."

Response:

On further consideration of this matter, CBP agrees with the point made by this commenter, because the definition of "customs business" in 19 CFR 111.1 is being amended specifically to exclude corporate compliance activity from customs business, making an exception to the license requirement redundant. Accordingly, the regulatory changes adopted in this final rule document do not include the addition of proposed new paragraph (a)(2)(vii) to § 111.2.

Comment:

CBP needs to narrow the definition of "customs business" and broaden the definition of "corporate compliance activity." Specifically, the latter definition should not exclude document preparation and filing.

Response:

Document preparation is specifically mentioned as one of the activities falling within the statutory and regulatory meaning of "customs business." The filing with CBP of those prepared documents is the logical next step and involves direct representations to the Government agency responsible for administering the matters to which those documents pertain. These considerations formed the basis for excluding document preparation and filing from the definition of "corporate compliance activity." In defining "corporate compliance activity", CBP endeavored to strike a balance between an importer's obligation to exercise reasonable care and the licensing requirements of 19 U.S.C. 1641. This balance is achieved by allowing related companies to provide advice while at the same time precluding them from preparing and filing documentation.

Comment:

The prohibition against document preparation and filing should be lifted if steps are taken to ensure that the importer of record remains liable.

Response:

By focusing on the liability of the importer of record, this comment appears to misconstrue CBP's primary focus in this matter, which was the customs broker statute and regulations. The exception regarding document preparation and filing by a related company was included in the definition of "corporate compliance activity" only in recognition of the explicit terms of 19 U.S.C. 1641 and not in order to suggest that an importer of record's liability would cease if the documents were prepared and filed by a related company. The legal obli-

gations of importers of record, whether contractual under their bonds or otherwise imposed by other statutes or regulations, will remain undisturbed by this amendment to the customs broker regulations.

Comment:

The regulations pertaining to "corporate compliance activity" should restrict document preparation and filing to those entry documents that are required to be filed under 19 U.S.C. 1484.

Response:

CBP disagrees, because the document preparation and filing aspect of "customs business" extends to preparation and filing activities performed after the filing of the entry and entry summary. This rule is reflected in 19 CFR 111.2(b)(2)(i)(D), which provides that a broker who did not file the entry, but who is appointed by the importer of record to make written or oral representations to CBP after entry summary acceptance, must have a national permit if the broker does not have a district permit where the representations will be made.

Comment:

While the proposed amendment will be beneficial both to the industry and to CBP, it does not make clear whether related parties can assist each other in responding to Customs Form 28 Requests for Information or Customs Form 29 Notices of Action, or in preparing or filing Post Entry Amendments, Supplementary Information Letters, documents relating to compliance audits or assessments, or certificates of origin.

Response:

The prohibition against preparing and filing documents under the broker statute and regulations applies not just to the entry and entry summary, but to all other documents for which preparation and filing constitutes "customs business" or for which no explicit allowance is made by statute or regulation for preparation or filing by an "authorized agent." Examples of documents for which there is an explicit allowance for action by an authorized agent are protests, ruling requests, and certain drawback documents. Since the proposed definition of "corporate compliance activity" contained no limitation or exception regarding the scope of document preparation and filing, the prohibition would apply to those specific examples mentioned by this commenter to the extent that they involve a customs business activity. However, a determination on whether a specific action constitutes a customs business activity can only be made on a case-by-case basis, for example through the binding ruling process.

Comment:

Certain activities should be specifically authorized in the regulatory text (for example, classifying and valuing goods, providing ad-

vice on origin marking requirements, providing training to related companies, preparing responses to marking and penalty notices and prior disclosures, and representing companies before CBP in an audit). Alternatively, the definition of "corporate compliance activity" should be amended to include offering specific advice on the classification, valuation, or admissibility of merchandise.

Response:

CBP does not believe that it would be advisable to include specific authorized activities within the regulations, because it would be impractical to list every conceivable activity that related companies may perform for each other. Listing some but not others would potentially create confusion or uncertainty as regards activities not listed. Some of the responses to comments in this final rule document may provide guidance on which activities are or are not permissible. For example, it has already been explained above that advisory activities will be allowed, while written communications with Customs in most circumstances would not be permitted. Importers with questions on a particular activity may request that the matter be resolved through the binding ruling process.

Comment:

It is common for corporations to establish subsidiaries that have their own boards of directors and officers, but no employees. An example would be a sales or procurement subsidiary. In such cases, the parent may be preparing the subsidiary's documentation. The proposed regulations, with their restrictions on document preparation, are problematic in this regard.

Response:

The preparation of documents under the corporate organizational scenario described by this commenter would constitute the performance of customs business in violation of the broker statute. Adoption of the proposed regulatory amendments would not alter that fact. The purpose of this rulemaking initiative is to facilitate the exercise of reasonable care, not to facilitate circumvention of the statutory obligation to seek the assistance of a licensed broker when a company, for its own business reasons, chooses not to have employees who can prepare and file documents with CBP.

Comment:

CBP needs to further define what constitutes "preparation" within the context of a corporate compliance activity. Does the gathering and organization of information fall within the definition? Does it include the preparation of background documentation whose contents will be reflected on the entry?

Response:

The proposed definition of "corporate compliance activity," which precludes the "actual preparation or filing of the documents or their

electronic equivalents," in effect addresses the issue raised in this comment. The word "actual" is intended to emphasize that the documents in question are those that will be filed with CBP. Therefore, any work performed in anticipation of document preparation, including the gathering and organizing of information and its recordation on background paperwork, will be allowed under this provision.

Comment:

It is unclear whether employees of a corporate compliance office will be able to discuss with CBP issues concerning a related company's import transactions.

Response:

Discussions with CBP regarding import transactions may amount to the transaction of customs business given that the statutory definition of "customs business" includes "those activities involving transactions with the Customs Service* * * ." However, CBP recognizes that preventing communication between corporate compliance offices and CBP would frustrate the primary purpose of such an office, that is, to provide accurate advice to the related company. In another example of making an accommodation between broker licensing and reasonable care requirements, CBP has determined that representatives of corporate compliance offices may communicate directly with CBP on behalf of related companies regarding the activities performed by the corporate compliance office to ensure that reasonable care was used in connection with preparation and filing of Customs documents. However, they should be prepared to demonstrate their authority to represent the interests of the related companies by presentation of a power of attorney or other letter of authorization.

Comment:

It is unclear whether there would be a violation of the proposed rule if a corporate compliance office were to supply specific tariff information in writing to a related company. This needs to be clarified, as do questions arising over whether related companies can file ruling requests or protests on behalf of each other.

Response:

No violation would occur if the compliance office were simply supplying the specific tariff information to the related company. The related company importer could then use the information to fill out the documentation to be filed with CBP, or turn it over to a broker for that purpose. On the issue of ruling requests and protests, 19 CFR 177.1(c) and 19 CFR 174.12(a)(6), respectively, permit an "authorized agent" to file those documents.

Comment:

Please explain why companies that employ in-house customs brokers cannot provide advice, or prepare and file documents, on behalf

of related companies. Such centralization would help to achieve high compliance rates.

Response:

The broker statute makes provision for various types of broker's licenses: individual, corporate, association, or partnership. While the mere providing of advice to a related company may present no problem, if a corporation wishes to transact customs business (for example, prepare and file documents) for others, it must obtain a corporate license of its own. This requirement does not disappear simply because the corporation has a person on its payroll who is individually licensed, because the employee's licensed status does not confer a similar status on the employer. Furthermore, the actions of the employee performed during the regular course of his employment will be attributed to his employer, not to him individually. An analogy may be drawn to the situation in which an insurance company hires an attorney to work in its policy underwriting department: the employment of the attorney does not entitle the insurance company to practice law.

Comment:

Most corporations with centralized customs compliance functions have put into place standard operating procedures ("SOPs") for responding to CBP inquiries, submitting documents to CBP, and working with their various customs brokers. If CBP takes a strict approach to what constitutes the actual preparation and filing of documents, corporations will be forced to redesign their SOPs to limit their compliance activities. Such changes would probably include a restructuring of the corporation's relationship with its customs brokers to ensure that in-house customs compliance personnel only provide information to customs brokers and, perhaps, review any documents to be filed with CBP. Restricting the in-house compliance activities in this manner does not advance the policy goal of fostering reasonable care under the Mod Act.

Response:

A reference to document "preparation" was added to the definition of "customs business" in the broker statute by section 648 of the Mod Act, and this statutory change has been in effect since December 8, 1993. The proposed regulatory changes at issue here did not attempt to impose a change in the meaning of document preparation. Moreover, as already pointed out in this comment discussion, the reference to "actual" preparation in the proposed regulatory text was intended to clarify that permissible corporate compliance activities include activities leading up to, but not in fact directly involving, document preparation. Therefore, to the extent that a corporation has been in compliance with the statutory standard since the adoption of the Mod Act amendment in 1993, the proposed regulatory

amendments would not require any change in the corporation's SOPs as regards compliance activities.

Although the Mod Act amended 19 U.S.C. 1484 by imposing a reasonable care responsibility on importers of record, it did not eliminate or modify the requirement in 19 U.S.C. 1641 that a person have a broker's license to conduct customs business on behalf of others. The Mod Act also made no changes to the identity of the persons who, pursuant to 19 U.S.C. 1484, have the right to make entry. Those persons are the owner or purchaser of the imported merchandise, or a licensed broker who has been appointed by the owner, purchaser or consignee. Consequently, CBP in defining "corporate compliance activity" had to take into account the requirements of the broker and entry statutes. By proposing the addition of an explicit provision allowing related companies to have centralized compliance departments whose role would be advisory in nature, CBP attempted to strike a balance between an importer's reasonable care obligations and the proscription regarding the performance of customs business on behalf of others without a broker's license. It is the position of CBP that the proposed amendments are not restrictive in their effect and that they will foster compliance with importers' reasonable care obligations.

Comment:

The development of the Automated Commercial Environment (ACE), and the possibility that future entries will be filed over the Internet, provides the perfect opportunity for CBP to look at changing practices. ACE will allow all parties to a customs transaction the ability to input information about the transaction. It is out of step for CBP to restrict these activities to independent customs brokers.

Response:

The proposed regulations would enhance, not restrict, the ability of related companies (including those that have in-house brokers) to engage in certain activities that previously under the broker regulations were restricted to importers or their appointed brokers. The liberalization in the proposed regulatory changes had to stop at document preparation and filing in order to ensure the most appropriate balance between reasonable care obligations and the terms of the broker statute.

Comment:

CBP has recognized that the effectiveness of its new security measures (for example, C-TPAT, Account Management, Importer Self-Assessment) are enhanced by corporate centralization of customs functions, yet the proposed rule limits the ability of companies to effectively centralize import operations.

Response:

As stated throughout this comment discussion, both CBP and importers must operate within the confines of existing law. In this case due regard must be given to the entry and broker provisions of 19 U.S.C. 1484 and 1641. CBP believes that the proposed regulatory changes will enhance, rather than limit, the ability of related companies to centralize their import operations. To the extent that the proposed amendments may not go as far as the commenter would like, that is a function of the limits imposed by the statutory provisions in question.

Comment:

As an alternative to the suggested changes, the definition of "person" in 19 CFR 111.1 could be changed so that the parenthetical phrase "(including subsidiaries and sister companies)" is added after the word "corporation." With a definition such as this, corporations could conduct the same activities for subsidiaries as they do for themselves.

Response:

CBP examined but rejected this approach when drafting the proposed regulations. Altering the definition of "person" in such a manner that subsidiaries are considered to be the same person as their parent would have consequences that go beyond the corporate compliance issue at hand. This is because the new definition will apply to everything that takes place under Part 111 of the Customs Regulations, not just to corporate compliance activities. Since a person must obtain a license to conduct customs business as a broker, questions would inevitably arise whenever a parent or subsidiary corporation applied for a license. For example, would a license granted to a parent also cover its subsidiaries, since by definition they would be one and the same person? Or would a subsidiary even have the right to apply for a license in its own name, given that its identity had been subsumed into that of the parent? Furthermore, the legal separation between parent and subsidiary corporations is recognized elsewhere in the Customs Regulations, and thus the elimination of that separation from the broker regulations would not only create a legal inconsistency but would also have the potential to create confusion in other regulatory contexts.

Comment:

A better approach would be to change the definition of "for one's own account" to clearly encompass the transaction of customs business on behalf of subsidiary companies. In this manner, the definition of "customs business" could remain unchanged, and it would be unnecessary to carve out limited exceptions when interpreting the definition.

Response:

CBP also considered this option when formulating the regulatory proposals. However, for essentially the same reasons stated in the preceding comment response for not changing the definition of a "person," CBP decided not to adopt this approach.

Comment:

The proposed rule does not clarify the distinction between the assigning of a Harmonized Tariff Schedule number to inbound items for entry submission to CBP and the review of internal classification databases. The former is a part of the entry process, and is thus customs business, while the latter is merely a corporate compliance activity.

Response:

While CBP agrees that the tariff classification of items to be entered may constitute a customs business activity depending on the context in which it is done, this regulatory initiative also recognizes that some accommodation must be made to enable companies to meet their reasonable care obligations. To this end, the proposed regulations would allow a compliance department to provide tariff classification advice to a sister or parent entity for all purposes, including advice regarding the assigning of tariff numbers for placement on an entry. However, that compliance department may not prepare the actual entry document.

Comment:

The proposed definitions of eligible related parties are clear and do not create any particular problems.

Response:

CBP agrees that the definitions are clear. However, as indicated later in this comment discussion, some adjustments to the proposed text are made in this final rule document in response to concerns raised in other comments.

Comment:

CBP should replace the proposed related party definition with the related party standard employed for customs valuation purposes. One commenter specifically suggested that CBP should resort to the more limited related party definition as expressed in 19 U.S.C. 1401a(g)(1)(G).

Response:

CBP believes that the related party definition used generally for valuation purposes is too broad for application in the context under review here. For example, the valuation definition includes relationships between family members. Its wholesale adoption would thus be inappropriate.

The narrower suggestion, that CBP use the more limited related party definition as set forth in 19 U.S.C. 1401a(g)(1)(G), is also unacceptable. That provision confers a relationship on "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." According to a notice entitled "Transfer Pricing; Related Party Transactions" published in the Federal Register (58 FR 5445) on January 21, 1993, determinations of "control" must be made on a case by case basis within the context of the administrative review procedures available to the importing public under Parts 174 and 177 of the Customs Regulations. The adoption of a definition that requires the issuance of a protest review decision or a ruling to determine if a party qualifies would be difficult to administer, and, as such, would not be appropriate in the present regulatory context.

Comment:

As an alternative to the 50 percent ownership requirement, the rule should allow ownership of some equity or voting shares coupled with proof of the retention of substantive management rights, such as the right to designate officers or directors. Such a standard would take into account modern forms of corporate organization while also assuring that only those entities exerting control were engaged in permissible compliance activity.

Response:

Receiving accurate information from importers is crucial to CBP's mission. The agency fosters accuracy through the issuance of informed compliance publications and binding rulings and by offering outreach programs to the importing community. It also makes use of the procedures that enable it to seek redress against persons who file inaccurate or incomplete entry documentation. Among its options in this regard, CBP can assess liquidated damages against an importer of record for a breach of the basic importation bond, or discipline licensed brokers pursuant to 19 U.S.C. 1641. Corporate compliance offices under this new regulatory scheme will not be subject to similar actions by CBP, because they will not be importers of record or, in most cases, licensed brokers. Absent some assurance of accountability, CBP would be reluctant to allow an unlicensed third party to participate in the entry process, because the accuracy of the information generated by that third party may be questionable. CBP, in imposing a substantial ownership standard (that is, more than 50 percent of the voting shares), seeks to establish what might be best described as cascading accountability by ensuring that entities offering compliance services are accountable to importers who are, in turn, accountable to CBP. Accordingly, the proposed standard is retained in the final rule. With regard to the point concerning modern forms of corporate organization, see the response to the next com-

ment, which also discusses the replacement of the reference to "voting shares."

Comment:

The proposed definition of related parties only refers to voting shares of corporations and does not address other voting interests such as joint ventures, partnerships, limited partnerships, limited liability companies, or any other legal structure now or hereafter existing. Such situations should be considered, and all possible business entities should be addressed, by the regulations.

Response:

Even though CBP believes that the 50 percent ownership standard should be retained as stated above, CBP also recognizes that in today's business environment relationships may be forged between companies that fall outside of the traditional corporate parent/subsidiary structure. Accordingly, in the regulatory text adopted in this final rule document, references to parent, subsidiary, and sister corporations are replaced with the more generic terms "business entity" and "related business entity or entities," with "business entity" defined as "an entity that is registered or otherwise on record with an appropriate governmental authority for business licensing, taxation, or other legal purposes." In addition, because voting shares are not the exclusive basis for determining the ownership level in a business, the references to "more than 50 percent of the voting shares" have been replaced in the final regulatory text with more general references to "more than a 50 percent ownership interest."

Comment:

CBP should adopt a regulation to allow those entities transacting customs business on behalf of related affiliates to certify to CBP, upon request, that the entity exercises "responsible supervision and control" over the affiliate's customs activity.

Response:

CBP is uncertain as to the purpose behind this suggestion. The exercise of responsible supervision and control is a concept that applies to licensed customs brokers, upon whom that duty falls whenever they engage in customs brokerage activities. A broker can be sanctioned by CBP for failing to exercise responsible supervision and control. Since compliance departments will not be required to have broker licenses in cases covered by this new regulatory provision, the suggestion of this commenter does not appear to be relevant to the present exercise. For this reason, CBP declines to adopt the suggested certification procedure.

CONCLUSION

Based on the comments received and the analysis of those comments as set forth above, CBP believes that the proposed regulatory

amendments should be adopted as a final rule with the changes discussed above.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. CBP believes that the amendments will have only a minimal impact on overall customs broker operations because they do not authorize the preparation of documents and the filing of documents with CBP, which constitute the bulk of customs business services provided by brokers. CBP also believes that the amendments will provide positive economic and related benefits to other members of the import community. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, Bureau of Customs and Border Protection. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Imports, Licensing, Penalties, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, Part 111 of the Customs Regulations (19 CFR Part 111) is amended as set forth below.

PART 111—CUSTOMS BROKERS

1. The general authority citation for Part 111 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1624, 1641.

* * * * * * *

2. In § 111.1:

a. The definition of "customs business" is amended by adding at the end of the last sentence before the period the words "and does not include a corporate compliance activity"; and

b. A new definition of "corporate compliance activity" is added in appropriate alphabetical order to read as follows:

§ 111.1 Definitions.

* * * * * * *

Corporate compliance activity. "Corporate compliance activity" means activity performed by a business entity to ensure that documents for a related business entity or entities are prepared and filed with Customs using "reasonable care", but such activity does not extend to the actual preparation or filing of the documents or their electronic equivalents. For purposes of this definition, a "business entity" is an entity that is registered or otherwise on record with an appropriate governmental authority for business licensing, taxation, or other legal purposes, and the term "related business entity or entities" encompasses a business entity that has more than a 50 percent ownership interest in another business entity, a business entity in which another business entity has more than a 50 percent ownership interest, and two or more business entities in which the same business entity has more than a 50 percent ownership interest.

* * * * * * *

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

[Published in the Federal Register, August 11, 2003, (47455)]

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19 CFR Part 4

RIN 1515–AD35

[CBP Dec. 03–16]

TONNAGE DUTIES—REVISED AMOUNTS

AGENCY: Customs and Border Protection, Homeland Security.

ACTION: Final rule.

SUMMARY: This document amends the rules dealing with vessels in foreign and domestic trades by revising the amounts of tonnage duties applicable to those entering the United States from a foreign port. These revisions are necessary to reflect recent changes in the pertinent statutory provisions.

EFFECTIVE DATE: August 13, 2003.

FOR FURTHER INFORMATION CONTACT: Glen Vereb, Entry Procedures & Carriers Branch, (202) 572–8730.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs and Border Protection (CBP) assesses and collects tonnage duties and light money on vessels brought into the United States from a foreign port or place, under the authority of 46 U.S.C. App. 121. Tonnage duties, which are in effect charges for the privilege of entering, trading in, or lying in a port, cover the expenses incurred in clearing and improving harbors, erecting lighthouses and keeping up lights. The amount of tonnage duty depends on the registry of the vessel, subject to certain exemptions, as prescribed by law.

On November 5, 1990, the President signed the Omnibus Budget Reconciliation Act of 1990 (Public Law 101–508), which amended 46 U.S.C App. 121 to increase the tonnage taxes collected from vessels arriving in the United States from foreign ports. The amendment intended to offset the costs incurred by Coast Guard operations. For vessels calling on the United States from North American ports and certain Central American, South American and Caribbean ports, the amount of tonnage tax was increased to 9 cents per ton, not to exceed in the aggregate 45 cents per ton per annum. For vessels entering a port of the United States from any other foreign port or place, the amount of tonnage tax was increased to 27 cents per ton, not to exceed $1.35 per ton per annum. These increases were in effect until the end of fiscal year 2002; thereafter the duties were to revert to the same amount as in effect prior to the passage of this legislation.

Congress has not enacted legislation renewing these provisional tonnage duty rates. In accordance with the statute, the tonnage tax rates have reverted to the previous rates of 2 cents per ton (10 cents annual aggregate cap) for vessels arriving in the United States from the first group of ports and 6 cents per ton (30 cents annual aggregate cap) for vessels arriving from all other originating ports.

Thus, CBP has determined that current statutory provisions require CBP to amend Part 4 of the Customs Regulations (19 CFR § 4.20) to revise the amounts of tonnage duties applicable to vessels entering from a foreign port or place. Following is a summary of those changes.

DISCUSSION OF CHANGES

1. Section 4.20(a) generally provides for the payment of tonnage tax on vessels entering from a foreign port or place. Section 4.20(a) is revised to reflect changes in the regular tonnage duty applicable in such circumstances.

2. Section 4.20(b) is amended to reflect the revised maximum assessment amount of tonnage duty of a vessel per tonnage year. The revised aggregate amount for vessels arriving in the United States from North American ports, certain Central American, South American and Caribbean ports is 10 cents per ton. For vessels arriving from all other originating ports the revised amount is 30 cents per ton.

3. Section 4.20(c) generally provides for the payment of special tonnage tax and light money on vessels entering from a foreign port or place. The present table in this section listing the vessel tonnage and light money rates payable under various conditions is revised to reflect the current tonnage duty rates.

The following chart indicates the provisional tonnage tax amount that has expired and the currently assessed amount.

Vessels entering US from:	Provisional tonnage tax per ton (annual cap)	Current tonnage tax per ton (annual cap)
North America, Central America, the West Indies, the Bahama Islands, the Bermuda Islands, the coast of South America bordering on the Caribbean Sea, or the high seas adjacent to the US or the above listed foreign locations	9¢ (45¢)	2¢ (10¢)
Any other foreign port	27¢ ($1.35)	6¢ (30¢)

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT AND DELAYED EFFECT REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Inasmuch as these amendments merely conform the Customs Regulations to existing law as noted above, pursuant to 5 U.S.C. 553(b)(3)(B), notice and public procedure thereon are unnecessary and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*).

For the same reasons, the amendments do not meet the criteria for a "significant regulatory action" as specified in E.O. 12866. Accordingly, a regulatory impact analysis it is not required thereunder.

DRAFTING INFORMATION

The principal author of this document was Fernando Peña, Office

of Regulations and Rulings, Bureau of Customs and Border Protection. However, personnel from other Bureau offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Cargo vessels, Coastal zone, Coastwise trade, Customs duties and inspection, Entry, Fees, Fishing vessels, Freight, Harbors, Imports, Maritime carriers, Reporting and recordkeeping requirements, Seamen, Vessels, and Yachts.

AMENDMENTS TO THE REGULATIONS

For the reasons stated above, Part 4 of the Customs Regulations (19 CFR Part 4) is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 and the specific authority citation for § 4.20 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91.

* * * * * * *

Section § 4.20 also issued under 46 U.S.C. 2107(b), 8103, 14306,14502, 14511, 14512, 14513, 14701, 14702; 46 U.S.C. App. 121, 128;

* * * * * * *

2. Amend § 4.20 as follows:

a. In paragraph (a):

i. all references to the number "9" are removed and, in their place, the number "2" is added;

ii. all references to the number "27" are removed and, in their place, the number "6" is added;

iii. the reference to the number "45" is removed and, in its place, the number "10" is added; and,

iv. the figure "$1.35" is removed and, in its place, the number "30" is added.

b. In paragraph (b):

i. the reference to the number "9" is removed and, in its place, the number "2" is added;

ii. the reference to the number "27" is removed and, in its place, the number "6" is added; and,

iii. the figure "$1.80" is removed and, in its place, the figure "40 cents" is added.

c. In the table under paragraph (c), in the column headed "Regular tax":

i. the figure "0.09" and all the figures reading ".09" are removed and, in their place, the figure ".02" is added; and,

ii. the figure "0.27" and all the figures reading ".27" are removed and, in their place, the figure ".06" is added.

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

Dated: August 7, 2003

[Published in the Federal Register, August 13, 2003, (48279)]

19 CFR PART 103

RIN 1515–AD18

CONFIDENTIALITY PROTECTION FOR VESSEL CARGO MANIFEST INFORMATION

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws a notice of proposed rulemaking (NPRM) published in the **Federal Register** by the U.S. Customs Service (now a bureau within the new Department of Homeland Security and renamed the Bureau of Customs and Border Protection (CBP)) on January 9, 2003, regarding the confidential treatment of certain vessel manifest information. The NPRM proposed to provide that, in addition to the importer or consignee, parties that electronically transmit vessel cargo manifest information directly to CBP 24 or more hours before cargo is laden aboard the vessel at the foreign port may request confidentiality with respect to importer or consignee identification information. Current regulations allow only the importer or consignee, or an authorized employee, attorney, or official of the importer or consignee, to make such requests. After careful consideration, CBP has decided to withdraw the proposal because of the clear lack of consensus on the part of the trade community regarding the value of the proposed amendment and the administrative burden the proposal, if adopted, would create for CBP and U.S. importers.

EFFECTIVE DATE: The effective date of this withdrawal is August 13, 2003.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Disclosure Law Branch, OR&R, (202) 572–8717, and Glen Vereb, Chief, Entry Procedures & Carriers Branch, Office of Regulations and Rulings (OR&R), at (202) 572–8724.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 9, 2003, the U.S. Customs Service (now a bureau within the new Department of Homeland Security and renamed the Bureau of Customs and Border Protection (CBP)) published a notice of proposed rulemaking (the NPRM) in the **Federal Register** (68 FR 1173) proposing to amend § 103.31 of the Customs Regulations (19 CFR 103.31) pertaining to public disclosure of vessel manifest information and the confidential treatment of some of that information for importers and consignees. Under § 103.31(d)(1), an importer or consignee, or an authorized employee, attorney, or official of the importer or consignee, can file a request for confidentiality (referred to as a certification in the regulation) relative to the name and address of the importer or consignee and the name and address of its shippers. The proposed regulation would allow, in certain circumstances, certain carriers handling the importer's or consignee's shipments, if properly authorized, to also file a confidentiality request on behalf of the importer or consignee.

This document withdraws the NPRM.

Prior relevant rulemaking and the NPRM

On October 31, 2002, CBP published a final rule document in the **Federal Register** (67 FR 66318) that amended the Customs Regulations pertaining to the inward foreign manifest to provide that CBP must receive from the carrier the vessel's Cargo Declaration (Customs Form (CF) 1302), one document among a few that comprise the manifest, or a CBP-approved electronic equivalent of the cargo declaration, at least 24 hours before the cargo is laden aboard the vessel at the foreign port, and to require that Vessel Automated Manifest System (AMS) participants provide the cargo declaration electronically.

The regulation also provides that a properly licensed or registered non-vessel operating common carrier (NVOCC) that is in possession of an International Carrier Bond containing the provisions of § 113.64 of the regulations (19 CFR 113.64) may electronically transmit required manifest information directly to CBP through the AMS 24 or more hours before cargo it delivers to the vessel carrier is laden aboard the vessel at the foreign port. If the NVOCC chooses not to transmit the required manifest information to CBP, as described above, the regulation requires the NVOCC to instead fully disclose and present the required information to the vessel carrier to allow the vessel carrier to present the information to CBP via the AMS system (see 19 CFR 4.7(b)(3)). (The manifest information filing procedure of § 4.7(b) is sometimes referred to in this document as the "24-hour rule.")

The final rule document (in the preamble discussion) also noted the NVOCC community's concern that certain information and data that a NVOCC would supply under the procedures of the "24-hour rule" would be subject to release for publication under 19 U.S.C. 1431 (section 1431) and § 103.31 of the Customs Regulations. The NVOCC group contended that such release would reveal confidential business information that could result in harm to the NVOCC community.

To respond to this concern, CBP indicated that it would publish another NPRM for the purpose of seeking further input from the trade regarding the value of amending § 103.31 to allow NVOCCs and vessel operating common carriers (ocean carriers) filing manifest information in accordance with the "24-hour rule" to request confidentiality under the regulation on behalf of importers and consignees. At the same time, the agency began considering whether section 1431 might accommodate expanding the parties who can file a confidentiality request on behalf of an importer or consignee. The result was publication of the January 9, 2003, NPRM and its request for public comment.

The statute and the regulation

At the heart of the NPRM were the provisions of section 1431 regarding public disclosure and confidential treatment of vessel manifest information. Under section 1431(c)(1), certain vessel manifest information must be made available for public disclosure, including, among other things, the name and address of each importer and consignee, the name and address of the importer's or consignee's shipper, the general character of the cargo, the name of the vessel or carrier, and the country of origin of the shipment. Under section 1431(c)(1)(A), the importer or consignee may request that its name and address and the name and address of its shipper be kept confidential by filing a biennial certification in accordance with regulations adopted by CBP. Under § 103.31(a) of the Customs Regulations (19 CFR 103.31(a)), vessel manifest information must be made available, under rules set forth in the regulation, to accredited representatives of the press, including newspapers, commercial magazines, trade journals, and similar publications. As stated previously, under § 103.31(d), an importer or consignee, or an authorized employee, attorney or official of the importer or consignee, may request confidentiality relative to the importer's or consignee's name and address, and the name and address of its shippers, by filing a request with CBP every two years.

The statute and regulation thus require that certain manifest information be made available to the public and, at the same time, that importers and consignees be permitted to keep their identity confidential, along with that of their shippers, should they so choose. In passing section 1431, Congress struck a balance between freedom

of information (the requirement to release/disclose manifest information) and fair competition (the right to request confidentiality of certain information by importers and consignees) (hereinafter referred to as the "freedom of information—confidentiality balance"). Many in the trade community and related businesses benefit from the availability of manifest information, and some importers and consignees utilize the confidentiality provision to protect their competitive posture. Regarding this balance, it is noted that Congress stated that "greater disclosure of manifest information will facilitate better public analysis of import trends, and allow port authorities and transportation companies, among others, more easily to identify potential customers and changes in their industries." (S. Rep. No. 308, 98th Cong., 1st Sess. 30 (1983), *reprinted in* 1984 U.S.C.C.A.N. 4910, 4939.) Congress further stated that section 1431 "retains sufficient protection for business-confidential data of importing firms, while encouraging greater competition among those in the import-servicing trades." *Id.*

DISCUSSION OF COMMENTS

A total of 60 comments were submitted in response to the NPRM. A substantial majority of the comments were opposed to amending § 103.31 as the NPRM proposed, and most of the minority in favor of the proposal indicated that it did not go far enough and should be improved.

Comments in Favor of the Proposed Amendment

Eight of the 60 commenters favored adoption of the amendment proposed in the NPRM. These commenters include organizations representing customs brokers, freight forwarders, NVOCCs, importers, exporters, and/or retailers, and one organization representing producers and marketers of distilled spirits. All of these commenters favored adoption of the proposal, claiming that it would protect from disclosure what they consider commercially sensitive business confidential information submitted in accordance with the "24-hour rule." These commenters contended that release of this information will harm their competitive posture, expose their and their customers' shipments to a greater risk of theft, and pose a terrorist security threat to the nation. They pointed out that their information was not subject to disclosure prior to promulgation of the "24-hour rule" and contended that the "24-hour rule's" implementation, which they do not oppose, should not impose this negative impact on their businesses.

Despite their support for the proposed amendment, most of these commenters indicated their dissatisfaction with the particulars of the proposal and recommended several ways to improve it, variously including:

(1) dropping the documentation requirement (power of attorney and/or letter of authorization) applicable to the additional parties that could request confidentiality under the proposed regulation, on the grounds it is time consuming and onerous for importers/consignees to produce it and for the additional parties (NVOCCs and ocean carriers) to manage and submit it; (many commenters, both for and against, were unsure whether the proposed regulation, which requires that the importer/consignee designate the NVOCC or ocean carrier as its attorney-in-fact, requires a power of attorney);

(2) allowing the additional parties filing confidentiality requests under the proposed regulation to retain the required documentation in their records rather than submit it with the confidentiality request;

(3) adding a general exclusion from the disclosure requirement for any information relative to FROB (Freight Remaining on Board) merchandise;

(4) allowing all NVOCCs to request confidentiality, whether or not they are licensed or registered with the Federal Maritime Commission or they have the capacity to file information electronically;

(5) providing that a general grant of confidentiality apply to all information submitted by NVOCCs and ocean carriers under the "24-hour rule," not just importer/consignee identification information; and

(6) improving the process by reducing the incidence of erroneous disclosures and eliminating the biennial filing requirement.

Comments in Opposition to the Proposed Amendment

Fifty-two of the 60 commenters opposed adoption of the amendment proposed in the NPRM. These commenters include: U.S. manufacturers, producers, and importers; a publisher of trade information; a United States Attorney, Department of Justice; ocean carriers and shipping companies; market researchers and consultants; trade associations; port authorities; local and regional economic and business development organizations; offshore suppliers; and a U.S. Congressman. From their comments, several significant reasons for opposition to the proposed amendment emerged. Because of the number of individual comments opposing the proposal, they are consolidated and presented below according to subject.

The proposed amendment goes beyond the terms of the statute and is contrary to Congressional policy

Many of the commenters opposing the proposed amendment contended that: (1) The proposed expansion of the parties authorized to request confidentiality under the regulation strains the language of the statute and the intent of Congress and (2) this expansion would wrongly upset the "freedom of information—confidentiality balance" provided for under section 1431.

These commenters stated that allowing additional parties to request confidentiality under the regulation would lead to the filing of more requests and a corresponding reduction of available information. Also, according to these commenters, most or perhaps all of these additional requests would be authorized by importers or consignees who otherwise would not make the request of their own volition; instead, the NVOCCs and ocean carriers allowed to request confidentiality under the proposed regulation would seek authorization, for their own reasons, from their importer and consignee clients to file the confidentiality requests. Thus, these commenters stated, access to information would be blocked, to the detriment of those who rely on that information, while the purpose of section 1431—excluding from disclosure the identities of importers and consignees for *their* protection—would not be served.

The proposed amendment is not necessary

Many commenters contended that there is no need to amend the regulation. This contention has two parts. The first asserts that there is no need to amend the regulation because the "disclosure-confidentiality process" that is now in place under the statute and the regulation works well for both the trade community that utilizes the information and the importers and consignees who may request confidentiality if they so desire. These commenters repeatedly stated that the current law strikes the right balance between freedom of information and confidentiality. In this regard, these commenters pointed out that the NPRM did not identify a single problem, difficulty, or impediment facing importers or consignees under the current system that might warrant a fix to further the intent of the law.

The second part of the contention questioned the NVOCC community's claim to need protection from harm that would result from disclosure of the manifest information for which it now seeks to request confidentiality. These commenters pointed out that, for many years, under the current system, ocean carriers have not suffered harm requiring remedy despite the fact that they have not had the right to request confidentiality on behalf of their importer or consignee clients. They thus questioned the contention that a level of harm requiring remedy would result upon the release of that same manifest information submitted by NVOCCs authorized to file confidentiality requests under the proposed amendment.

The proposed amendment harms those entities that utilize publicly available trade information

Many commenters in opposition cited the broad extent of the harm that the proposed amendment would inflict on those many elements of the trade and related communities that utilize the disclosed manifest information for a wide variety of reasons. A long list of users of and uses for the information emerged from the comments. Some of

the users are: Trade associations and other advocates for U.S. manufacturers/producers, importers, and exporters; port authorities; advocates for local, state, and regional economic and business development; carriers and others involved in shipping and shipping related businesses; a publisher of trade information; a market researcher and consultant; and law enforcement entities. Some of the uses are to: identify overseas markets; locate overseas suppliers; attract and develop customers; promote increased international trade and resulting economic growth; plan port expansion and development; compete with other ports for business; compile trade information to advise/assist business and trade clients; and enforce laws concerning counterfeit trademarks and unlawful foreign competition.

These commenters asserted that allowing additional parties to request confidentiality for importers and consignees, and the corresponding reduction of available information caused by this expansion, would result in serious harm to their competitive advantage and damage or ruin their businesses. These commenters asserted that CBP should not limit its evaluation of the matter to the harm that the NVOCC community alleges it would suffer, but should also consider the negative impact the change would have on other elements of the trade community.

Operational burdens

A few commenters objected to the proposal on grounds that it would impose additional operational burdens on all parties and would result in a more bureaucratic and less efficient system. First, the NVOCC or ocean carrier would have to contact its importer and consignee clients to solicit the authorizations, requiring a considerable effort and a major document management task. The importers and consignees would have to prepare a power of attorney (or other document for attorney-in-fact designation) and a letter of authorization for a NVOCC or ocean carrier seeking to file a confidentiality request on their behalf, something they do not have to do under the current regulation. A few commenters asked if a set of such documents would have to be prepared for each NVOCC or carrier seeking authorization and if confidentiality would then be applied on a shipment-by-shipment basis or on a NVOCC/carrier-by-NVOCC/ carrier basis.

Second, the NVOCC or ocean carrier would then have to submit the request along with the authorization letter to CBP, a more onerous task than merely submitting a request in the manner the current procedure provides. Several asked whether a power of attorney would have to be submitted with the request and authorization letter. Others asked about recordkeeping requirements.

Third, these commenters indicated that the burden on CBP also would increase significantly in verifying and tracking authorizations

and requests, suggesting creation of a more bureaucratic system with a more complicated document management component. Some asked how multiple requests (from different NVOCCs or carriers) for the same importer or consignee would be handled. Even if only one request per importer or consignee were required, which is not clear under the proposed regulation, CBP would have to determine if a request had already been filed on behalf of an importer/consignee each time it received a request for an importer/consignee. Also, if requests were not accompanied by the required document(s), CBP would have to request the document(s) or send the certification back to the filer, holding acceptance and processing of the certification in abeyance. If questions were raised about the legitimacy or details of the authorization letter or the power of attorney (or other document), if required and submitted, CBP would have to make inquiries.

The proposed amendment poses a security risk

Another reason for opposition to the proposed amendment mentioned by a few commenters was the matter of security. Some contended that curtailing the quantity of available information would harm local, state, and federal security and law enforcement interests. Some stated that the fact that the information is not disclosed until after a shipment has arrived and been processed/released does not mean that the information would lack value. Meaningful investigative information could be gleaned after the fact, revealing patterns or past conduct that could be helpful in law enforcement or antiterrorism security initiatives. One commenter's letter included a letter from a U.S. Attorney whose access to trade information assisted his office in obtaining convictions for a smuggling related crime.

Business practices adjustment

Several commenters in opposition complained that altering the disclosure/ confidentiality process under the regulation would require further adjustments by those involved in the import and import servicing trades. For example, one commenter stated that changing the content of information disclosed would result in an unfavorable change to its business practices and a negative impact on its bottom line.

CBP's Determination

After reviewing the comments, and upon further consideration of the matter, CBP has determined to withdraw the proposal. It is apparent that most of those who favored the idea behind the proposed regulation nevertheless believe that the regulation, as drafted, does not go nearly far enough; however, the plain language of the statute will not allow CBP to go nearly as far as they would prefer. Those who objected to the proposed regulation believe that it went much too far and that the status quo was preferable for many reasons.

Thus, because such a substantial majority of the commenters did not favor the actual proposed regulation and the comments revealed such a strong split within the trade community, CBP has decided not to engage in any rulemaking activity in this area for these reasons and the reasons explained below.

CBP agrees with those commenters who stated that adoption of the proposed amendment would result in an increase in the number of confidentiality requests made under the regulation. CBP acknowledges that most of that increase would likely result from the solicitation of importer and consignee authorizations by NVOCCs and carriers allowed to make the request under the proposed regulation. In a recent month since publication of the NPRM, although certainly premature, one quarter of the confidentiality requests CBP received were made by NVOCCs on behalf of their importer/consignee clients. If the proposed amendment were adopted, the increase in the volume of confidentiality requests would, to a corresponding extent, result in less available information for those segments of the trade community that utilize and rely on that information. This, in turn, raises a legitimate question as to whether the proposal would have a deleterious impact on the "freedom of information—confidentiality balance" that the statute provides.

Regarding the terms of the statute, because most of the additional requests would be made on behalf of importers and consignees who might not otherwise make the request of their own volition, CBP has had to consider whether the proposed amendment would serve the interests of parties not intended to be beneficiaries of the law, i.e., NVOCCs and ocean carriers handling the importer's/consignee's shipments. CBP agrees that the statute is designed to protect the identities of importers and consignees (and their shippers if desired) for reasons that are related to their own competitive well being, not for reasons related to the competitive well being of the NVOCCs and ocean carriers filing manifest information in accordance with the "24-hour rule."

Thus, upon review of the comments and further review of the matter, CBP recognizes that allowing these other parties to file confidentiality requests for their importer and consignee clients will not further the intent of the law's confidentiality provision to protect the interests of the importers/consignees, but will instead serve the interests of these other parties at the expense of users of manifest information whose interest this law is also intended to serve. Importers and consignees *already* enjoy the benefits of this law through the current regulation, which allows confidentiality requests to be made by their authorized employees, attorneys, or officials.

Moreover, CBP is further persuaded by several of the other comments opposing the proposed amendment and submits that the weight of these other comments, taken together, provides additional support for a decision to abandon the NPRM. Primary among these

other reasons against adoption of the proposal are that the proposal, if adopted, would cause some degree of harm to certain elements of the trade community without producing a beneficial impact on the law's beneficiaries or achieving a result mandated by law; the proposal would create an unacceptable operational burden on CBP; and it would create additional operational burdens on all involved parties, including the importers and consignees who may request confidentiality under the current regulation without preparing a power of attorney or authorization letter. Also, the proposed amendment raised a number of significant questions, as made clear by the comments for and against, and as discovered by CBP during its further review of the matter, indicating that amending the process as proposed is more complicated and problematic than initially contemplated. This recommends to an additional extent abandonment of the project.

In summary, it is clear that there is no consensus among members of the trade community on the value of adopting the proposed regulation and that the greater weight of the comments is persuasively against adoption. Also, the proposed regulation, if adopted, would have presented a considerable challenge to administrative efficiency for both CBP and importers and consignees.

Dated: August 7, 2003

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

[Published in the Federal Register, August 13, 2003 (48327)]

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19 CFR PARTS 4, 103, 113, 122, 123 AND 192

RIN 1515–AD33

REQUIRED ADVANCE ELECTRONIC PRESENTATION OF CARGO INFORMATION

AGENCY: Customs and Border Protection, Homeland Security.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide that Customs and Border Protection (CBP) must receive, by way of a CBP-approved electronic data interchange system, information pertaining to cargo before the cargo is either brought into or sent from the United States by any mode of commercial transportation (sea, air, rail or truck). The cargo information required is that which is reasonably necessary to enable high-risk shipments to be identified so as to prevent smuggling and ensure

cargo safety and security pursuant to the laws enforced and administered by CBP. The proposed regulations are specifically intended to implement the provisions of section 343(a) of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002.

DATES: Written comments must be received on or before August 22, 2003.

ADDRESSES: Written comments are to be addressed to the Bureau of Customs and Border Protection (CBP), Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, NW., Washington, D.C. 20229. Submitted comments may be inspected at CBP, 799 9th Street, NW., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT:

Legal matters: Glen E. Vereb, Office of Regulations and Rulings, 202–572–8724;
Trade compliance issues:
Inbound vessel cargo: Kimberly Nott, Field Operations, 202–927–0042;
Inbound air cargo: David M. King, Field Operations, 202–927–1133;
Inbound truck cargo: Enrique Tamayo, Field Operations, 202–927–3112;
Inbound rail cargo: Juan Cancio-Bello, Field Operations, 202–927–3459;
Outbound cargo, all modes: Erika Unangst, Field Operations, 202–927–0284;
For economic impact issues: Daniel J. Norman, Field Operations, 202–927–4305.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 343(a) of the Trade Act of 2002 (Public Law 107–210, 116 Stat. 933, enacted on August 6, 2002), as amended by section 108 of the Maritime Transportation Security Act of 2002 (Public Law 107–295, 116 Stat. 2064, enacted on November 25, 2002), and codified at 19 U.S.C. 2071 note, requires that the Secretary endeavor to promulgate final regulations not later than October 1, 2003, that provide for the mandatory collection of electronic cargo information by the Customs Service (now part of the Bureau of Customs and Border Protection (CBP)), either prior to the arrival of the cargo in the United States or its departure from the United States by any mode of commercial transportation (sea, air, rail or truck). Under section 343(a),

as amended, the information required must consist of that information about the cargo which is determined to be reasonably necessary to enable CBP to identify high-risk shipments so as to prevent smuggling and ensure cargo safety and security pursuant to the laws that are enforced and administered by CBP.

Consequently, for the purposes set forth in section 343(a), as amended, and within the parameters prescribed in the statute, as highlighted below, this document proposes to amend the Customs Regulations in order to require the advance electronic transmission of information pertaining to cargo prior to its being brought into, or sent from, the United States.

CBP Authority for Issuance of Proposed Rule

When the Trade Act of 2002 was enacted (Public Law 107–210; August 6, 2002), CBP was part of the Department of the Treasury as the Customs Service. Thereafter, the Homeland Security Act of 2002 was enacted (Public Law 107–296; November 25, 2002), which created the Department of Homeland Security (DHS). Section 403 of the Homeland Security Act (the Act) transferred to the newly created Department the functions, personnel, assets, and liabilities of the Customs Service, including the functions of the Secretary of the Treasury relating thereto. Customs, later renamed as CBP, thereby became a component of DHS. Furthermore, the Department of the Treasury recently issued an order (Treasury Order 100–16, dated May 15, 2003) delegating to DHS certain Customs revenue functions that were otherwise retained by the Treasury Department under sections 412 and 415 of the Act. In accordance with the Homeland Security Act and this transfer and delegation of functions, certain matters, such as this proposed rule which is designed to ensure cargo safety and security rather than revenue assessment, now fall solely within the jurisdiction of DHS.

Therefore, inasmuch as CBP is an integral component of DHS, and in view of the subject functions transferred/delegated in this regard from Treasury to DHS, this proposed regulation is being issued by CBP with the approval of DHS. Nevertheless, CBP has also coordinated the development of this proposed rule jointly with the Treasury Department.

Statutory Factors Governing Development of Regulations

Under section 343(a), as amended, the requirement to provide particular cargo information to CBP is generally to be imposed upon the party likely to have direct knowledge of the required information. However, where doing so is not practicable, CBP in the proposed regulations must take into account how the party on whom the requirement is imposed acquires the necessary information under ordinary commercial practices, and whether and how this party is able

to verify the information it has acquired. Where the party is not reasonably able to verify the information, the proposed regulations must allow the party to submit the information on the basis of what it reasonably believes to be true.

Furthermore, in developing the regulations, CBP, as required, has taken into consideration the remaining parameters set forth in the statute, including:

- The existence of competitive relationships among parties upon which the information collection requirements are imposed;
- Differences among cargo carriers that arise from varying modes of transportation, different commercial practices and operational characteristics, and the technological capacity to collect and transmit information electronically;
- The need for interim requirements to reflect the technology that is available at the time of promulgation of the regulations for purposes of the parties transmitting, and CBP receiving and analyzing, electronic information in a timely fashion;
- That the use of information collected pursuant to these regulations is to be only for ensuring cargo safety and security and preventing smuggling and not for determining merchandise entry or for any other commercial enforcement purposes;
- The protection of the privacy of business proprietary and any other confidential cargo information that CBP receives under these regulations, with the exception that certain manifest information is required to be made available for public disclosure under 19 U.S.C. 1431(c);
- Balancing the likely impact on the flow of commerce with the impact on cargo safety and security in determining the timing for transmittal of required information;
- Where practicable, avoiding requirements in the regulations that are redundant with one another or with requirements under other provisions of law; and
- The need, where appropriate, for different transition periods for different classes of affected parties to comply with the electronic filing requirements in the regulations.

Additionally, the statute requires that a broad range of parties, including importers, exporters, carriers, customs brokers, and freight forwarders, among other interested parties, likely to be affected by the regulations, be consulted and their comments obtained and evaluated as a prelude to the development and promulgation of the regulations. In furtherance of this, by a notice published in the **Federal Register** (67 FR 70706) on November 26, 2002, the United States Customs Service, which is now merged into CBP, announced a series of public meetings in accordance with section 343(a) to assist in the formulation of these proposed regulations. The meetings were also announced on the Customs web site.

Separate meetings were scheduled and held to address specific issues related to the advance electronic presentation of information prior to the arrival or departure of air cargo (January 14, 2003), truck cargo (January 16, 2003), rail cargo (January 21, 2003) and sea cargo (January 23, 2003). "Strawman" proposals were offered by Customs at the meetings and were made available on the Customs web site. In the meetings, members of the importing and exporting community made many significant observations, insights, and suggestions as to what CBP should consider and how CBP should proceed in composing the proposed regulations. Also, at the meetings and on the Customs web site, suggestions and comments were solicited from the public. The CBP received numerous submissions via e-mail which similarly provided valuable insights and recommendations regarding the development of the proposed rule.

Moreover, an extensive number of meetings were held with workgroups of the subcommittee on advance cargo information requirements of the Treasury Advisory Committee on the Commercial Operations of the U.S. Customs Service (COAC), which greatly assisted CBP in its development of these proposed regulations. Indeed, much of the input and recommendations from those members of the trade who participated in the public meetings, the various workgroups of the COAC subcommittee, as well as the views expressed in the many e-mail submissions in this matter, are reflected in these proposed regulations.

In this regard, what follows is a review of, and CBP's response to, the most salient issues and recommendations that were presented pursuant to this consultation process, along with an overview of the proposed programs for advance information filing for cargo destined to, or departing from, the United States by vessel, air, rail or truck.

PUBLIC COMMENTS; GENERAL

COSTS OF AUTOMATION; ECONOMIC ANALYSIS

Comment:

Any implementing regulations compelling the advance presentation to CBP of electronic information for cargo destined to the United States, under section 343(a), as amended, would impose substantial automation costs on the carrier trade. The CBP should conduct an economic impact analysis to this effect.

CBP Response:

As is set forth below, there are electronic data transmission systems already in place in many of the modes. When coupled with the fact that much of the trade already uses these systems, it does not

appear that requiring advance electronic cargo information would impose substantial costs on the trade.

Nevertheless, Customs and Border Protection (CBP) has conducted an economic analysis to determine whether the proposed rule is an "economically significant regulatory action" under Executive Order 12866 and whether the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) would apply to this rulemaking. It has been determined, as a result of the *initial* analysis conducted, that this proposed rule would not have a significant economic impact upon a substantial number of small entities under the RFA. This economic analysis is attached as an Appendix to this document. For the reasons set forth in the analysis, the agency does not make a certification at this time with regard to the regulatory requirements of 5 U.S.C. 603 and 604. Comments are specifically requested as to the impact of the proposed rule on small entities.

This rule is a "significant regulatory action" under Executive Order (E.O.) 12866 and has been reviewed by the Office of Management and Budget in accordance with that E.O. However, it is our preliminary determination that the proposed rule would not result in an "economically significant regulatory action" under E.O. 12866, as regards the impact on the national economy.

PROTECTION OF CONFIDENTIAL INFORMATION PRESENTED TO CBP

Comment:

Cargo manifest data collected by CBP under section 343(a), as amended, should be kept confidential by the agency and not be released to the public.

CBP Response:

Section 343(a)(3)(G), as amended, expressly requires that CBP in its implementing regulations protect the privacy of any business proprietary and any other confidential cargo information that is furnished to CBP in accordance with section 343(a), except for any manifest information that is collected pursuant to section 431, Tariff Act of 1930, as amended (19 U.S.C. 1431), and required to be available for public disclosure pursuant to section 1431(c). It is emphasized in this connection that the application of section 1431(c) has been effectively limited only to vessel cargo manifest information (§ 103.31, Customs Regulations (19 CFR 103.31)).

As thus mandated by the law, CBP intends to accord full protection to the privacy of air, rail, or truck cargo information that is collected under section 343(a), as amended; to this effect, CBP has included in this document a proposed amendment to part 103, Customs Regulations (19 CFR part 103) (see proposed § 103.31a)).

INFORMATION TECHNOLOGY; INTERFACE WITH OTHER GOVERNMENT AGENCIES

Comment:

The regulations should avoid redundancy requirements with those of other Federal agencies. There should be one filing procedure for all Federal agencies (*e.g.*, the Food and Drug Administration (FDA); and the Animal and Plant Health Inspection Service (APHIS)). All data elements to be required by Federal agencies, both within and without the Department of Homeland Security (DHS), for traffic entering the United States should be coordinated through a single entity, preferably CBP. Toward this end, the notification requirements of other Federal agencies should be integrated into the CBP regulations for section 343(a), as amended.

CBP Response:

To the extent feasible, CBP will continue to explore ways and methods to harmonize and synchronize information collection requirements among the several agencies involved, so that the cargo information CBP collects under section 343(a), as amended, may be provided by electronic means to other Federal offices. Indeed, efforts in this regard are already underway in connection with the development of the Automated Commercial Environment (ACE) and the International Trade Data System (ITDS) (a single system that will fully integrate all requisite information about goods entering and exiting the United States). These discussions may ultimately lead to a sole portal ("single window") for receiving all inward cargo information that may be required to assist other agencies in administering and enforcing statutes enacted to further combat threats to the safety and security of the nation.

However, at present, CBP is of necessity operating under severe time constraints in endeavoring to comply with the statutory deadline for promulgating final regulations under section 343(a) as a national security imperative. Given the limited time available, the construction of a fully-integrated, comprehensive multi-agency electronic data interchange system does not, at this moment, appear to be a practicable or feasible concept, especially in view of the multitude of technological modifications and substantial reprogramming that would be needed for existing systems in order to effectuate this; and withholding the implementation of the final regulations pending the completion of an undertaking of such magnitude would quite clearly be inconsistent with the urgency of the legislation.

The CBP notes that other agencies, such as FDA, have different statutory requirements regarding advance notice of imports. The CBP further notes that, due to these different statutory requirements, these agencies may have different information needs to accomplish their different statutory mandates. For example, some of

the information requirements in section 307 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 to address food safety and security assessments, are different from those required by CBP. In some instances, the time needed by other agencies to receive, review, and respond to this information to accomplish their statutory mission may be different from the time required by CBP to assess and respond to information needed to achieve CBP's statutory mission. To the extent possible, CBP will work with other interested agencies to share the information collected under section 343(a), as amended, with other Federal agencies.

POSTAL SHIPMENTS

Comment:

The advance cargo information provisions for incoming cargo should apply to air/vessel shipments through the United States Postal Service (USPS).

CBP Response:

As prescribed in section 343(a)(3)(K), as amended, CBP has the authority, in consultation with the Postmaster General, to require advance cargo information for shipments by the USPS. The CBP still has this issue under consideration. Should a determination be made to extend the advance electronic cargo information mandate to USPS shipments, such postal shipments would be the subject of a separate notice of proposed rulemaking.

OVERVIEW; ELECTRONIC FILING; SHIPPER ON MASTER/HOUSE BILLS

Pursuant to section 343(a)(1), as amended, cargo information for required inbound and outbound shipments must be transmitted to CBP by means of a CBP-approved electronic data interchange system. In this document, CBP is proposing that cargo information be transmitted or presented through existing CBP-approved data systems. As is further elucidated *infra*, for each incoming mode and for all outbound modes, these existing data systems are as follows:

Outbound, all modes: Automated Export System (AES);
Inbound vessels: Vessel Automated Manifest System (Vessel AMS);
Inbound aircraft: Air Automated Manifest System (Air AMS);
Inbound rail: Rail Automated Manifest System (Rail AMS);
Inbound truck: Free And Secure Trade System (FAST); Pre-Arrival Processing System (PAPS) (which employs the Automated Broker Interface (ABI)); Border Release Advanced Screening and Selectivity program (BRASS, modified as appropriate); and Customs Automated Forms Entry System (CAFES) or ABI in-bond reporting.

In this latter regard, and to the additional extent that future approved automated data systems are to be implemented, CBP, either generally or on a port-by-port basis, as applicable, will give advance notice of the effective date of implementation of the specific system at particular port(s) of arrival by publishing a notice to this effect in the **Federal Register**.

MASTER BILLS/HOUSE BILLS

Generally speaking, a master bill of lading refers to the bill of lading that is generated by the incoming carrier covering a consolidated shipment. A consolidated shipment would consist of a number of separate shipments that have been received and consolidated into one shipment by a party such as a freight forwarder or a Non Vessel Operating Common Carrier (NVOCC) for delivery as a single shipment to the incoming carrier. The consolidated shipment, as noted, would be covered under the incoming carrier's master bill; and this master bill could reflect the name of the freight forwarder, the NVOCC or other such party as being the shipper (of the consolidated shipment).

However, each of the shipments thus consolidated would be covered by what is referred to as a house bill. The house bill for each individual shipment in the consolidated shipment would reference the name of the actual shipper (which would be the actual foreign owner and exporter of the cargo to the United States). As will be seen from the data elements as proposed in this rulemaking, it is this latter information as to the identity of the actual shipper from the relevant house bill that CBP is seeking for targeting purposes.

PUBLIC COMMENTS; VESSEL CARGO DESTINED TO THE UNITED STATES

SUMMARY OF PRINCIPAL COMMENTS

Most of the comments received concerning the advance information reporting requirements for incoming vessel cargo evidenced an intent to revisit the "24-hour rule" that was issued and became effective last year (T.D. 02–62, 67 FR 66318; October 31, 2002).

In brief, it was principally requested that advance cargo information filing by Non Vessel Operating Common Carriers (NVOCCs) be eliminated, due to a number of operational problems experienced by incoming carriers, that have resulted from limitations said to be inherent in the Vessel Automated Manifest System (AMS) when NVOCCs, as opposed to the vessel carriers, transmit shipment information to CBP; at the same time, though, it was advocated that importers should be permitted, at their discretion, to file through AMS certain information that would likely best be known to them as to the identification and nature of the incoming cargo. Also, it was asked that definitions be added to the regulations regarding those

data elements pertaining to shipper and consignee information. In addition, it was asked that Department of Defense-contracted conveyances be exempted from the 24-hour rule.

CBP Response:

In sum, CBP stands by the 24-hour rule for incoming vessel cargo and does not contemplate any major change to it under this rulemaking, with one exception: to introduce the mandate that vessel carriers file their advance cargo manifest information with CBP electronically.

As explained in the final rule (67 FR at 66319), the 24-hour prelading requirement for incoming vessel cargo, especially containerized vessel cargo, is tied inextricably to the Container-Security Initiative (CSI). CSI was developed to secure an indispensable, but vulnerable, link in the chain of global trade: containerized shipping. Annually, more than 6 million cargo containers are off loaded at U.S. seaports. A core element of CSI is to pre-screen such containers at the port of departure *before* they are shipped. To enable this prescreening to be done fully and effectively, it is essential that the required advance cargo declaration information be presented to CBP at least 24 hours prior to lading the cargo aboard the vessel at the foreign port.

With the implementation of CSI and the 24-hour rule, CBP has been able to identify shipments that have posed potential threats; and security-related seizures of problematic shipments have occurred. In short, these programs—CSI coupled with the 24-hour rule—have become a critical bulwark against threats to the safety and security of United States seaports, trade, industry, and the country.

NON VESSEL OPERATING COMMON CARRIERS (NVOCCs)

In consideration of the competitive relationships that exist in the international freight forwarding field, those NVOCCs that seek to file required business proprietary and other confidential cargo information for their incoming shipments directly with CBP should be allowed to do so, rather than having to furnish such information to vessel carriers for electronic presentation to CBP. The CBP is confident that operational issues that have arisen in relation to the implementation of the 24-hour rule will over time be satisfactorily addressed; toward this end, CBP will continue to be available to assist the trade in resolving such issues.

There is no consensus in the trade community as to whether importers should provide sea cargo data to CBP. When this split is coupled with the current design and functionality of the AMS system, CBP finds that allowing importers, at their discretion, to participate in advance electronic filing through the system would at this time be neither advisable nor practicable.

GOVERNMENT VESSELS

Government vessels falling within the purview of § 4.5(a), Customs Regulations (19 CFR 4.5(a)), are exempt from the requirement to make entry, and, as such, they would already be exempt from having to comply with advance cargo declaration reporting under the 24-hour rule (see 19 CFR § 4.7(a), (b)(2)). For purposes of enlarging upon those vessels that would be subject to such exemptions, it is noted that by a separate, interim rule, CBP will expand the definition of government vessels.

DATA ELEMENTS—SHIPPER, CONSIGNEE; DATE AND TIME OF DEPARTURE

With reference to the identity of the shipper, at the master bill level, for consolidated shipments, the identity of the Non Vessel Operating Common Carrier (NVOCC), freight forwarder, container station or other carrier would be sufficient. For non-consolidated shipments, and for each house bill in a consolidated shipment, the identity of the actual shipper (who is both the owner and the exporter) of the cargo from the foreign country would be needed. To elaborate, the foreign owner of the goods just before they are delivered for export, and who initially consigns and ships them from the foreign country, is the party who ultimately decides that the goods are to be disposed of in another country, such as the United States. The foreign shipper and owner of the goods is, therefore, the exporter, because this is the party initially responsible for causing the export. Section 4.7a(c)(4)(viii), Customs Regulations (19 CFR 4.7a(c)(4)(viii)), would be revised to include the additional meaning of this data element.

In addition, with reference to the identity of the consignee, for consolidated shipments, at the master bill level, the identity of the NVOCC, freight forwarder, container station or other carrier would be sufficient. However, parties identified as "consolidators," even though they may also be NVOCCs, may not participate in Vessel AMS.

For non-consolidated shipments, and for each house bill in a consolidated shipment, the consignee would be the party to whom the cargo would be delivered in the United States, with the exception of "FROB" (Foreign Cargo Remaining On Board). If the name of the consignee, as described, is available, the carrier must disclose this information. However, where cargo is shipped "to the order of [a named party]," which is a common business practice, the carrier must report this named "to order" party as the consignee in the advance cargo information submission; and, if there is any other commercial party listed in the bill of lading for delivery or contact purposes, the carrier must also report this other commercial party's identity and contact information (address/phone number) in the "No-

tify Party" field of the advance electronic data transmission to CBP, to the extent that the CBP-approved electronic data interchange system is capable of receiving this data. Section 4.7a(c)(4)(ix) would be revised to include the added meaning of this data element.

Also, § 4.7a(c)(4) would further be amended to require the date and time of the departure of the vessel from foreign, as reflected in the vessel log.

OVERVIEW; VESSEL CARGO DESTINED TO THE UNITED STATES

ELECTRONIC FILING MANDATE

Under this proposed rule, in principal part, the 24-hour rule would be amended to provide that vessel carriers must present their cargo declarations to CBP by means of a CBP-approved electronic data interchange system, 24 hours before lading the cargo aboard the vessel in the foreign port.

TRANSITION/TIMETABLE FOR COMPLIANCE WITH ELECTRONIC FILING MANDATE

Within 90 days of the publication of this advance electronic cargo information requirement as a final rule in the **Federal Register**, all ocean carriers, and NVOCCs choosing to participate, must be automated on the Vessel AMS system at all ports of entry in the United States where their cargo will initially arrive.

COMMENTS; AIR CARGO DESTINED TO THE UNITED STATES

TIME FRAME FOR PRESENTING ADVANCE CARGO INFORMATION TO CBP

Comment:

The time frames for presenting electronic cargo information to CBP for air cargo prior to the cargo's arrival in the United States that were set forth in the "strawman" proposal (12 hours in advance of foreign lading generally, and 8 hours in advance of foreign lading in the case of express courier shipments) were excessively long. Such lengthy advance time frames would destroy "just-in-time" delivery systems. Instead, it was chiefly recommended that the time frame be one hour prior to arrival in the United States; other commenters, however, thought that the time frame for transmission should be determined on a country-by-country basis, or, in the alternative, at the time of "wheels-up" on the aircraft.

Also, it was asserted that the advance notice time frame should be consistent within each mode of transport; alternatively, it was suggested that the advance filing time frame for charter flights should be shorter than for other flights, and that there should be special procedures for time-sensitive cargoes (short haul).

CBP Response:

The time frames in the "strawman" proposal were put forth only for purposes of stimulating a dialogue with the importing trade regarding the development of an appropriate time frame for the electronic submission of information for inbound air cargo. This issue is central to the implementation of section 343(a) of the Trade Act of 2002, as amended.

Accordingly, after considering the feedback received from the importing trade in response to the "strawman," CBP is proposing in this rulemaking that information for inbound air cargo be electronically presented no later than the time of departure of the aircraft for the United States (no later than the time that wheels are up on the aircraft, and it is en route directly to the United States), in the case of aircraft departing for the United States from any foreign port or place in North America, which includes locations in Mexico, Central America, South America (from north of the Equator only), the Caribbean, and Bermuda. For aircraft departing for the United States from any other foreign area, information for the inbound air cargo would be required to be electronically presented to CBP no later than 4 hours prior to the arrival of the aircraft at the first port of arrival in the United States.

At present, CBP believes that these time frames (no later than "wheels-up" or 4 hours prior to arrival, as applicable) should enable CBP to properly conduct a risk assessment for incoming air cargo and, if found advisable, to make preparations to hold the cargo for further information or for examination, as required to ensure cargo safety and security under section 343(a), as amended. At the same time, CBP has determined that these time frames should realistically accommodate the concerns of the trade, and should not disrupt the flow of commerce. Indeed, an important reason for the different time frames proposed is the need to obviate disruptions in the flow of commerce; given this consideration, the effect on "just-in-time" ("JIT") delivery systems should be nonexistent.

The time frames proposed for submitting electronic information to CBP for inbound air cargo would thus be consistent for all air cargo shipments regardless of the type of operator or the nature of the cargo; the time frames would differ based only upon the foreign area from which the incoming air carrier was departing for the United States.

PARTIES REQUIRED/ELIGIBLE TO PARTICIPATE IN ADVANCE CARGO INFORMATION FILING

Comment:

It was asked whether freight forwarders to the United States would be required to participate in advance cargo information filing. In the alternative, it was requested that advance electronic shipment information be supplied to CBP by the foreign shipper (the exporter to the United States) or by the U.S. importer. In addition, it was recommended that freight deconsolidators (Container Freight Stations) be allowed to transmit in-bond information electronically to CBP at the house air waybill level. In this overall context, it was further mentioned that CBP would need to specify what type of bond would be required for any non-carrier commercial participants in advance electronic cargo information filing under section 343(a), as amended. Also, two commenters urged that cargo information be supplied to CBP by the foreign country (government).

It was also generally stated that some parties in the air environment would simply be unable to comply with the advance electronic cargo information requirements. In any case, it was asserted that any liability for the accuracy of the information that a party presented to CBP should fall upon the entity that supplied the information to the presenting party.

CBP Response:

Inbound air carriers that are otherwise required to make entry under § 122.41, Customs Regulations (19 CFR 122.41), would be required to file advance cargo information electronically with CBP. The existing automated air cargo manifest system (the Air Automated Manifest System (Air AMS)) was originally designed and structured to receive electronic data directly from the incoming air carrier.

Nevertheless, in addition to the incoming air carrier's mandatory participation in presenting advance electronic air cargo information, CBP has concluded that one of a number of other parties would be able to voluntarily present to CBP a part of the electronic information required for the inbound air cargo. These parties could consist of one of the following:

(1) An ABI (Automated Broker Interface) filer as identified by its ABI filer code (this entity could be either the importer of the cargo or the importer's authorized Customs broker);

(2) A Container Freight Station/deconsolidator as identified by its FIRMS (Facilities Information and Resources Management System) code;

(3) An Express Consignment Carrier Facility likewise identified by its FIRMS code; or

(4) Any air carrier as identified by its IATA (International Air Transport Authority) code, that arranged to have the incoming air carrier transport cargo to the United States.

Unlike Vessel AMS, as explained above, and Rail AMS, as discussed below, Air AMS has the existing design capabilities and functionality to, and in fact already does, accept information from parties other than the importing carrier for inward cargo shipments. The CBP expects to make this capability to supply data available to a wider group of trade members, as appropriate, and to make any systems modifications necessary to accommodate possible variations in the order in which data might be received.

Hence, along with the incoming air carrier for whom participation in Air AMS is compulsory, any one of the foregoing parties could elect to supply certain data for air cargo to CBP, provided that the party established the communication protocol required by CBP for properly presenting electronic data through the system, and provided further that the party, other than an importer or broker, was in possession of a Customs international carrier bond containing all the necessary provisions of 19 CFR 113.64.

However, in the case of cargo shipments transported under a consolidated master air waybill, only one party could supply information for all such cargo so shipped.

It is observed that the importer or its authorized agent would be the party in the United States most likely to have direct knowledge as to particular information about the nature and destination of the cargo. Secondly, a facility, such as a Consolidator or an Express Consignment Carrier, that handled the shipment and/or arranged for its delivery to the incoming carrier, would also have access to particular information about the cargo, more so than the incoming carrier. Generally speaking, for consolidated shipments, information in the direct possession of such a facility would consist of data from its house air waybill(s) that would not be directly known by the incoming carrier.

Thus, in recognition of possible competitive relationships that a party such as a container freight station, freight forwarder, or express consignment or other carrier, might have with the incoming air carrier, such party would have the opportunity, if it so elected, to present the required information directly to CBP, as opposed to having to present this information to the inward air carrier or a service provider who would, on its behalf, transmit this information for the cargo to CBP.

In any event, it would not be realistic or feasible to seek to obligate a foreign country (government) to transmit advance cargo information for commercial cargo sent from that country to the United States; and it is submitted in this connection that section 343(a)(3)(B), as amended, clearly envisages the electronic filing of cargo information by appropriate commercial or business entities, rather than foreign governments.

Since the party from whom electronic air cargo information would be required might not necessarily, in all situations, be the party with

direct knowledge of that information, CBP would take into consideration how, in accordance with ordinary commercial practices, the electronic filer acquired such information, and whether and how the filer was able to verify this information. Where the party electronically presenting the cargo information to CBP was not reasonably able to verify such information, CBP would permit the party to electronically present the information on the basis of what the party reasonably believed to be true.

Comment:

There should be an exemption from the advance cargo filing requirements for aircraft that are owned or leased by the Department of Defense.

CBP Response:

Aircraft, including public aircraft as defined in 19 CFR 122.1(i), that are exempt from entry under 19 CFR 122.41 would be exempt from advance cargo information filing under this proposed rule. It is noted that by a separate, interim rule, CBP will expand upon those aircraft that are subject to such an exemption from entry.

Comment:

Participants in the Customs-Trade Partnership Against Terrorism (C–TPAT), and related parties, should be excluded from the advance cargo information requirement or should be subject to a reduced time frame within which the advance cargo information must be transmitted.

CBP Response:

The CBP disagrees with this suggestion. However, participation in C–TPAT would be considered as one factor in targeting whether cargo needed to be held upon arrival pending the receipt of further information or for examination. Such additional information, if required, would have to be made available at the port of arrival.

REQUIRED CARGO INFORMATION;
AVAILABILITY/CORRECTION OF DATA TRANSMITTED

Comment:

For freight forwarders that might participate in the advance electronic filing of cargo information, it was asked what information they would specifically be required to transmit to CBP.

CBP Response:

The specific data elements that would be required from a participating party are enumerated below under the heading "OVERVIEW; AIR CARGO DESTINED TO THE UNITED STATES" (see "Addi-

tional Data Elements from Incoming Carriers; Other Participants"); and these data elements are also set forth in proposed § 122.48a(d). A freight forwarder could be included among those parties that could participate voluntarily in electronic cargo information filing, provided that the freight forwarder was either an ABI filer, a Container Freight Station/deconsolidator or an Express Consignment Carrier Facility; that it had posted a Customs international carrier bond containing all necessary provisions of 19 CFR 113.64; and that it had established the communication protocol required by CBP for properly presenting electronic data through the system.

Comment:

The CBP should clearly define the meaning of those data elements which must be presented for inbound air cargo.

CBP Response:

The CBP believes that the proposed data elements to be required in advance for incoming air cargo are fairly well known; however, a number of the data elements set out in the proposed regulations are accompanied by detailed explanations as to their meaning. Should it be called for, CBP will include additional definitions for those elements about which the importing air community might prefer greater elucidation. Therefore, CBP requests comments in response to this proposed rule especially concerning those data elements contained in proposed § 122.48a(d) for which the importing air community seeks additional guidance.

Comment:

Most of the necessary data for incoming cargo would not necessarily be available prior to its lading aboard the aircraft. Moreover, the line-item Harmonized Tariff Schedule (HTS) number for air cargo would not be available prior to the departure of the aircraft. The air carrier would not always have information for cargo at the house air waybill level; and CBP should allow in-transit consolidations to be reported at the master air waybill level. Also, CBP should permit an air carrier to submit electronic cargo data for shipments brought in by truck.

CBP Response:

Because CBP proposes to require advance cargo information for incoming aircraft either no later than the time of "wheels-up" or no later than 4 hours prior to arrival in the United States, as applicable (and not prior to the foreign lading of the cargo aboard the aircraft), the commenters' concerns as to the availability of the necessary data for the cargo prior to foreign lading are addressed.

Nevertheless, concerning the possible unavailability of the 6-digit HTS number for the cargo prior to foreign departure, it is empha-

sized that either a precise description of the cargo or its HTS 6-digit tariff subheading would be sufficient. In any case, under the proposal, as already explained, the line-item HTS number for the cargo would essentially not be required prior to the departure of the aircraft for the United States.

As to the carrier not always having cargo information from the house air waybill, should another party, such as an ABI filer, elect to participate in advance automated cargo information filing, the carrier would only be responsible for transmitting information from the master air waybill. However, if another electronic filer did not participate in transmitting needed cargo information to CBP, the incoming carrier would need to obtain the house air waybill information from the relevant party for presentation to CBP.

In-transit consolidations of inbound cargo typically present the same issues of cargo safety and security as other inbound shipments. Thus, the complete house air waybill information would be required from the carrier or the other party electing to participate in advance cargo information filing. Also, should an air carrier choose to ship freight by truck, advance cargo information would be required to be presented to CBP through the truck processing system (see proposed § 123.92); electronic air documents would not be accepted in lieu of advance electronic truck cargo information.

Comment:

If cargo were bumped from one flight to a later flight, there should be no need to re-transmit related cargo information that was previously transmitted to CBP.

CBP Response:

Given the time frames proposed, since cargo information would essentially not be required prior to the departure of the aircraft for the United States, this issue should not present a significant concern.

Comment:

The CBP should allow changes and additions to electronically transmitted manifest information in accordance with current manifest discrepancy reporting policies.

CBP Response:

Complete and accurate information would need to be presented to CBP for cargo aboard the aircraft no later than the time period specified for the particular foreign area from which the aircraft departs for the United States. As for any changes in the cargo information already transmitted for a flight, the procedures for discrepancy reporting will be the subject of a separate rulemaking.

PRE-DEPARTURE SCREENING OF CARGO; CARGO INSPECTIONS IN THE UNITED STATES

Comment:

Air cargo security is already highly regulated by the Transportation Security Administration (TSA), the Federal Aviation Administration (FAA), and other agencies and foreign governments. As such, there should be no pre-departure screening process required for incoming air cargo. In the alternative, it was advocated that CBP should consider a CSI (Container Security Initiative)-type program for air cargo. In the event that pre-departure/lading information is necessary for pre-screening purposes, CBP should provide a positive load/no-load message to the electronic filer. Also, for cargo that may be identified as high risk, CBP should not compel inspections of such cargo at locations in the United States that are merely technical stops.

CBP Response:

There will be no pre-departure-screening-and-hold process applied to air cargo under this proposal. While CBP may consider the possibility of developing a CSI-type initiative for air cargo based on a number of factors, including the terrorist threat, the success of industry security programs, and the success of this rulemaking and related CBP security efforts, such a proposal falls outside the scope of this rulemaking.

In addition, inspections of cargo in the United States conducted for the purpose of ensuring cargo safety and security and for the prevention of smuggling would only be conducted if the cargo had been identified as potentially posing a safety, security or smuggling risk; and CBP would work with the carrier and other affected Government agencies to determine an appropriate location to examine such potentially high-risk cargo. In appropriate cases, however, landing rights could be denied to an incoming carrier if advance cargo information was not timely, accurately, and completely presented to CBP (see proposed § 122.14).

Comment:

The possible need for a carrier to retain cargo in a staging/storage area at a foreign location in order to comply with a pre-departure advance information requirement for inbound cargo would create a security risk for the cargo that would not otherwise exist.

CBP Response:

As indicated, the time frames proposed for the advance reporting of air cargo information have been designed so as to preclude any need to retain cargo in a foreign area in order to comply with the pre-arrival reporting mandate.

REQUESTED EXEMPTIONS/EXCLUSIONS FROM ELECTRONIC FILING REQUIREMENTS

Comment:

Advance electronic information should not be required for inbound air cargo in diplomatic pouches. Merchandise brought in by the air carrier for its own use should be exempt as well from the advance electronic information provisions. Also, letters and documents should be exempted from the detailed advance electronic cargo information submission. It was further asked whether the advance filing requirements would apply to hand-carried merchandise or merchandise checked in passenger baggage.

CBP Response:

For purposes of this rulemaking, all air cargo shipped under an air waybill, regardless of its nature, would be subject to the advance electronic reporting provisions. This would include diplomatic pouches and letters and documents. Also, merchandise brought in by an air carrier for its own use would be subject to the same advance cargo information filing requirements that would apply to other incoming cargo. However, hand-carried merchandise and merchandise contained in passenger baggage would not be subject to the advance cargo information requirements in this rulemaking; such merchandise would be included in the passenger baggage declaration.

REQUIRED INFORMATION TECHNOLOGY; TRADE SUPPORT; TRANSITION PERIODS

Comment:

It was asked whether CBP would provide staffing for data/targeting analysis and related trade support on an around-the-clock basis; and two commenters were insistent that CBP conduct extensive training in Air AMS filing procedures at all ports. Various concerns were also expressed as to the ability of CBP to effectively analyze advance cargo information.

CBP Response:

An automated targeting system for performing a risk assessment for incoming air cargo will be fully in place upon the effective date of the final regulations. Automated data/targeting analysis for risk assessment will be available at all times. Related trade support will be available during regular port hours; and CBP will conduct any training that CBP personnel might need in Air AMS procedures.

Comment:

To effectuate the filing of electronic cargo information under section 343(a), as amended, CBP should consider integrating advanced

information technology (IT) products into its current automated manifest filing system. Additionally, the Automated Commercial Environment (ACE) system should be compatible with the implementing regulations. Also, there should be a grace period given under the implementing regulations in order to afford trade participants the chance to make suitable changes to their computer programming; and there should likewise be a grace period allowed during which such trade participants could bring the detail and accuracy of their advance information filing up to the level that CBP would require.

CBP Response:

While disposed to explore any advances in IT products, CBP will largely rely, at least initially, upon the Air AMS, with appropriate future modifications, as the principal vehicle to achieve the goal of advance air cargo information presentation under section 343(a), as amended. However, any new system developed within the framework of ACE will be compatible with the implementing regulations. For this reason, therefore, the implementing regulations will refer generally to a CBP-approved electronic data interchange system (rather than to Air AMS, specifically).

The CBP contemplates that, pursuant to section 343(a)(3)(J), as amended, the effective date that would be set for the final implementing regulations following their promulgation should afford sufficient time for Air AMS participants to make suitable changes to their programming for the advance transmission of cargo data; and the effective date would similarly incorporate a reasonable grace period within which Air AMS participants should be able to bring their advance data filing up to the level of detail and accuracy that CBP seeks. Specifically, the proposed effective date, and the provisions for delaying the effective date, for compliance with the advance presentation of electronic air cargo information to CBP under section 343(a), as amended, are contained in proposed § 122.48a(e).

OVERVIEW; AIR CARGO DESTINED TO THE UNITED STATES

Electronic Systems to be Used

Air carriers, and certain other parties authorized for voluntary participation in the program, must transmit through a CBP-approved electronic data interchange system advance cargo air waybill information, in accordance with the "Transition and Implementation Timeline" discussed below. The current CBP system for transmitting air cargo information is the Air Automated Manifest System (Air AMS). Also, certain express consignment carriers have proprietary electronic data systems which CBP personnel can access. The CBP will permit the use of these electronic proprietary systems, provided that the participants are capable of providing the data in a

suitable electronic format to CBP for the purposes of ensuring cargo safety and security and preventing smuggling, unless CBP determines that it is necessary to migrate those participants to Air AMS. In addition, these express consignment carriers will be required to provide CBP with an electronic record of the data in a CBP-approved storage medium. All other express consignment carriers, including those that currently submit information to CBP using paper documents, will be required to participate in Air AMS.

DATA SUBMISSION TIMELINESS

Air carriers and other parties electing to participate in the program would transmit the required information to CBP no later than the time of departure ("wheels-up") for aircraft that are departing for the United States from any foreign port or place in North America, including locations in Mexico, Central America, South America (from north of the Equator only), the Caribbean, and Bermuda. For aircraft departing for the United States from any other foreign area, such carriers and other parties would transmit the required information to CBP no later than 4 hours prior to the arrival of the aircraft at the first port of arrival in the United States. This amount of time should enable CBP to conduct an adequate analysis of the data and to select individual shipments for further document review or physical examination, while not disrupting the flow of commerce and "just-in-time" delivery systems.

PARTIES REQUIRED/ELIGIBLE TO PRESENT ADVANCE ELECTRONIC CARGO INFORMATION

All carriers required to enter under § 122.41, Customs Regulations (19 CFR 122.41), would be required to participate in the electronic data interchange system and present the necessary cargo information to CBP.

The carrier will only need to be automated at each port where entrance and clearance of the aircraft is required. Incoming air carriers and other authorized parties who choose to do so may participate in Air AMS until CBP migrates to a different processing system. For this reason, the implementing regulations will refer only to a "CBP-approved electronic data interchange system" in order to accommodate the future migration to any superseding data processing systems.

In addition to an incoming air carrier for whom participation will be mandatory, one of the following parties may elect to transmit particular data to CBP for incoming cargo: an ABI filer (importer or its Customs broker); a Container Freight Station/deconsolidator as identified by its FIRMS code; an Express Consignment Carrier Facility likewise identified by its FIRMS code; or an air carrier as identified by its IATA code, that arranged to have the incoming air car-

rier transport the cargo to the United States. To be qualified to file cargo information electronically, the party would need to establish the communication protocol required by CBP for properly presenting electronic information through the data interchange system; and, except for an importer or broker, the party would have to possess a Customs international carrier bond containing all the necessary provisions of 19 CFR 113.64.

Consequently, the carrier will either have to obtain all the needed cargo shipment information for presentation to CBP, or the carrier will need to obtain the unique identifier of the party that will separately transmit to CBP a portion of the required data for the cargo; the other party's unique identifier code would have to accompany the carrier's data transmission to CBP, so that CBP could associate the subject cargo shipment with both electronic transmissions related to the cargo.

Permission to unlade all or part of the cargo could be denied or delayed, and penalties and/or liquidated damages could be assessed, where the air carrier or other electronic filer transmitted inaccurate, incomplete or untimely information to CBP.

INFORMATION REQUIRED FROM AIR CARRIERS

An incoming air carrier would need to transmit all of the necessary information for non-consolidated air waybills. For consolidated shipments: the carrier would have to present to CBP all the required information from the master air waybill record; and the carrier would supply all the information for associated house air waybill records where another authorized party did not electronically transmit information for the associated house air waybills directly to CBP. If another approved party did transmit the information, the carrier would not be required to electronically supply such information.

The carrier would still be required under 19 U.S.C. 1431 to have a manifest for all cargo aboard the aircraft, whether that cargo was manifested under a non-consolidated air waybill or a house air waybill that was part of a consolidation.

These proposed regulations apply to air cargo that would be entered into the United States, as well as to in-transit air cargo including any cargo which remained aboard the aircraft on the same through flight.

SPECIFIC DATA ELEMENTS; AIR CARRIERS

In the following listing of data elements for air carriers, an "M" next to any element indicates that the data element would be mandatory in all cases; a "C" next to the data element indicates that the data element was conditional and would be transmitted to CBP if the condition were present for that particular air waybill.

(1) Air waybill number (M) (The air waybill number is the International Air Transport Association (IATA) standard 11-digit number);

(2) Trip/flight number (M);

(3) Carrier/ICAO (International Civil Aviation Organization) code (M) (The approved electronic data interchange system supports both 3- and 2-character ICAO codes, provided that the final digit of the 2-character code is not a numeric value);

(4) Airport of arrival (M) (The 3-alpha character ICAO code corresponding to the first airport of arrival in the Customs territory of the United States (for example, Chicago O'Hare = ORD; Los Angeles International Airport = LAX));

(5) Airport of origin (M) (The 3-alpha character ICAO code corresponding to the airport from which a shipment began its transportation by air to the United States (for example, if a shipment began its transportation from Hong Kong (HKG), and it transits through Narita, Japan (NRT), en route to the United States, the airport of origin is HKG, not NRT));

(6) Scheduled date of arrival (M);

(7) Total quantity based on the smallest external packing unit (M) (for example, 2 pallets containing 50 pieces each would be considered as 100, not 2);

(8) Total weight (M) (may be expressed in either pounds or kilograms);

(9) Cargo description (M) (for consolidated shipments, the word "Consolidation" is a sufficient description for the master air waybill record; for non-consolidated shipments, a precise cargo description or the 6-digit Harmonized Tariff Schedule (HTS) number must be provided);

(10) Shipper name and address (M) (for consolidated shipments, this may be the name and address of the consolidator, express consignment or other carrier, for the master air waybill record; for non-consolidated shipments, this must be the name and address of the actual shipper (the owner and exporter) of the merchandise from the foreign country);

(11) Consignee name and address (M) (for consolidated shipments, this may be the name and address of the container freight station, express consignment or other carrier, for the master air waybill record; for non-consolidated shipments, this must be the name and address of the party to whom the cargo will be delivered, with the exception of "FROB" (Foreign Cargo Remaining On Board));

(12) Consolidation identifier (C);

(13) Split shipment indicator (C) (this data element includes information indicating the particular portion of the split shipment that will arrive; the boarded quantity of that portion of the split shipment (based on the smallest external packing unit); and the boarded

weight of that portion of the split shipment (expressed in either pounds or kilograms));

(14) Permit to proceed information (C) (this element includes the permit-to-proceed destination airport (the 3-alpha character ICAO code corresponding to the permit-to-proceed destination airport); and the scheduled date of arrival at the permit-to-proceed destination airport);

(15) Identifier of other party which is to submit additional air waybill information (C);

(16) In-bond information (C) (this data element includes the destination airport; the international/domestic identifier (the in-bond type indicator); the in-bond control number, if there is one (C); and the onward carrier identifier, if applicable (C)); and

(17) Local transfer facility (C).

ADDITIONAL DATA ELEMENTS FROM INCOMING CARRIERS; OTHER PARTICIPANTS

In addition to the data elements listed in items "1" through "17" above, the incoming air carrier, or another eligible electronic filer electing to do so, must transmit the following information to CBP for the inward cargo:

(1) The master air waybill number and the associated house air waybill number (M) (the house air waybill number may be up to 12 alphanumeric characters (each alphanumeric character that is indicated on the paper house air waybill document must be included in the electronic transmission; alpha characters may not be eliminated));

(2) Foreign airport of origin (M) (The 3-alpha character ICAO code corresponding to the airport from which a shipment began its transportation by air to the United States (for example, if a shipment began its transportation from Hong Kong (HKG), and it transits through Narita, Japan (NRT), en route to the United States, the airport of origin is HKG, not NRT));

(3) Cargo description (M) (a precise description of the cargo or the 6-digit Harmonized Tariff Schedule (HTS) number must be provided. Generic descriptions, specifically those such as "FAK" ("freight of all kinds"), "general cargo", and "STC" ("said to contain") are not acceptable);

(4) Total quantity based on the smallest external packing unit (M) (for example, 2 pallets containing 50 pieces each would be considered as 100, not 2);

(5) Total weight of cargo (M) (may be expressed in either pounds or kilograms);

(6) Shipper name and address (M) (the name and address of the actual shipper (the owner and exporter) of the cargo from the foreign country);

(7) Consignee name and address (M) (the name and address of the party to whom the cargo will be delivered in the United States, with the exception of "FROB"); and

(8) In-bond information (C) (this data element includes the destination airport; the international/domestic identifier (the in-bond type indicator); the in-bond control number, if there is one (C); and the onward carrier identifier, if applicable (C).

ADVANCE ELECTRONIC INFORMATION FOR LETTERS AND DOCUMENTS

For purposes of compliance with the advance cargo information filing requirements under section 343(a), as amended, letters and documents would be subject to the same procedures as all other types of cargo. Such "letters and documents" comprise the data (for example, business records and diagrams) described in General Note 19(c), Harmonized Tariff Schedule of the United States (HTSUS); personal correspondence, whether on paper, cards, photographs, tapes, or other media; and securities and similar evidence of value described in subheading 4907, HTSUS, but not including monetary instruments covered under 31 U.S.C. 5301–5322.

ELECTRONIC FREIGHT STATUS NOTIFICATIONS

If the facility (carrier, deconsolidator, or other party) currently holding the goods was automated, that party would have to honor all freight status notifications transmitted by CBP. Cargo could not be transferred to another facility, moved under the provisions of the in-bond regulations or released to the consignee except upon electronic status notifications from CBP. Should the cargo be transferred to a non-automated facility (*e.g.*, a Container Freight Station, a carrier facility in another port, or the like), that facility would be required to accept only paper documents for the disposition of the cargo.

TRANSITION AND IMPLEMENTATION TIMELINES

All air carriers, and those authorized parties that choose to participate in presenting advance cargo information electronically to CBP through the approved automated system, would be expected to comply with the provisions of these regulations on and after 90 days from the date that the final rule in this matter is published in the **Federal Register**. However, CBP could delay the implementation of the final regulations at a given port until the necessary training had been provided to CBP personnel at that port. Also, CBP could delay the effective date of the final regulations in the event that any essential programming changes to the applicable CBP-approved electronic data interchange system were not in place. Finally, CBP could delay the effective date of the regulations if further time were required to complete certification testing of new participants. Any

such delay would be the subject of a notice provided through the **Federal Register**

ELECTRONIC SYSTEM FAILURE; DOWNTIME

Should the approved electronic data interchange system go down, the incoming air carrier and, if applicable, any other electronic filer would have to submit a hard copy equivalent of all required electronic cargo information to CBP either no later than "wheels-up" or no later than 4 hours prior to the arrival of the aircraft in the United States, depending upon the foreign area from which the incoming aircraft departs for the United States.

COMMENTS; RAIL CARGO DESTINED TO THE UNITED STATES

TIME FRAME FOR TRANSMITTING INFORMATION; IMPACT ON COMMERCE

Comment:

Various suggestions were made regarding the time in which advance rail cargo data would need to be electronically presented to CBP. Specifically, the following time frames were put forth: 4 hours prior to departure for the United States; 4 hours prior to arrival in the United States; 2 hours prior to arrival; and under 2 hours prior to arrival. By contrast, it was stated that the time frame set forth in the "strawman" proposal (24 hours prior to lading in the foreign country) was unworkable/unrealistic. It was also stated that any time frame that CBP proposed should not adversely impact "just-in-time" shipping practices.

CBP Response:

The time frame in the "strawman" was put forth only as a perfunctory proposal, merely for the purpose of eliciting feedback from the trade in order to assist CBP in developing an appropriate time frame for inclusion in the proposed regulations. After considering the various recommendations from the rail trade, CBP agrees with those commenters who recommended that electronic cargo data for incoming rail cargo be presented no later than 2 hours prior to the arrival of the cargo at a United States port of entry.

The CBP is of the opinion that this minimum 2-hour period for presenting rail cargo information electronically in advance of arrival is a reasonable and practical time frame for the submission of the necessary cargo data, and one that should not disrupt the flow of rail commerce into the country. This view is based in large part on the understanding that rail carriers will transmit cargo data on many types of shipments (*e.g.*, intermodal sea traffic) as it becomes avail-

able, thereby limiting the amount of data that is transmitted 2 hours prior to arrival.

At present, CBP finds that this is the minimum time period needed to perform the requisite risk analysis in relation to the transmitted data, and, if necessary, to request further information about the cargo, or to arrange for its examination in those instances, which are anticipated to be rare, where an examination should be found warranted.

Rail carriers need to be advised, however, that while CBP is confident that the targeting can be accomplished within the 2-hour period, it may result in more trains spending time at the border uncoupling cars in order for them to be examined. Nevertheless, CBP is confident that this proposed time frame should not have any notable impact upon rail business practices, including "just-in-time" (JIT") inventory shipments. In this latter respect, CBP is aware that commerce has increasingly relied on "JIT" shipping as a more cost effective way of conducting business.

PARTY REQUIRED TO PRESENT DATA TO CBP

Comment:

One commenter asked that the shipper (the exporter from the foreign country) and the United States importer be required to transmit the required cargo data to CBP. Another commenter said that the shipper should supply the data. Three commenters asserted that data should be accepted utilizing current systems and that the trade not be forced to incur extraordinary expenses for system upgrades which might only have to be quickly replaced due to the establishment of the Automated Commercial Environment (ACE).

CBP Response:

While it is recognized that the shipper and/or the United States importer could be the parties most likely to possess direct knowledge of particular information about the incoming rail cargo, CBP has initially concluded that it should be incumbent upon the rail carrier to submit the required information for the cargo. Simply stated, the current CBP-approved electronic data interchange system (the Rail Automated Manifest System (Rail AMS)) is essentially structured and programmed only to receive such data directly from the carrier. Accepting advance cargo information from the shipper and/or the United States importer would not be practicable in the present automated rail environment.

The CBP will employ the prevailing system to electronically transmit and receive cargo information pending the advent of the Automated Commercial Environment (ACE). When ACE is established and in place, it may have the capability to receive data from the foreign exporter and/or the U.S. importer.

REQUESTED EXEMPTIONS FROM THE ADVANCE ELECTRONIC FILING REQUIREMENTS

Comment:

Vessel-to-rail containers and bulk/break-bulk shipments should be exempted from the filing requirements. Members of C–TPAT (the Customs-Trade Partnership Against Terrorism) and participants in the FAST (Free And Secure Trade) system should be exempted from having to present advance electronic cargo data for their shipments; and the Department of Defense (DoD) should have exemptions based on the nature of their shipments (descriptions for sensitive military cargo should be general).

CBP Response:

Generally speaking, it is the view of CBP that a straightforward and streamlined regulation, unencumbered with multiple special exemptions, would present the most workable system especially with respect to the rail environment. Given the abbreviated time frame proposed (no later than 2 hours prior to arrival at a U.S. port of entry), CBP believes that the rail community in particular should be able to comply with the advance transmission of needed cargo data, with no measurable disruption in the flow of cross-border commerce; this should render moot most of the special requests for exemptions from the proposed advance filing requirements.

Nevertheless, CBP is proposing to exempt one category of cargo from the advance automated notification rule: domestic cargo that would arrive by train at one port from another in the United States after transiting a foreign country would not be subject to the advance electronic information filing requirement for incoming cargo; but advance information for such domestic cargo may be electronically presented to CBP, if desired.

REQUIRED DATA ELEMENTS

Comment:

Required data elements to be transmitted to CBP should be clearly set forth; and CBP should give clear instructions as to what level of data would be sought.

CBP Response:

The proposed data elements for incoming rail cargo are contained in proposed § 123.91(d). A number of the data elements contained in this proposed regulation are accompanied by explanations. The CBP will include additional definitions for those elements about which the importing rail community may desire greater elucidation. To assist in making this determination, CBP requests comments espe-

cially concerning those data elements for which the importing rail community seeks further guidance.

INFORMATION TECHNOLOGY; HIGH RISK CARGO

Comment:

The CBP would need to automate any ports that were not already automated in order to enable the port to transmit or receive electronic data as part of the advance information filing program.

CBP Response:

The CBP will automate any remaining port that is not now operational on the existing CBP-approved electronic data interchange system (Rail AMS).

Comment:

Mandatory automation under section 343(a), as amended, would place additional pressure on trade participants. The CBP should take steps to ensure that its offices would be fully staffed around-the-clock at all rail crossings in order to handle any eventualities resulting from the implementation of the final advance cargo information filing regulations.

CBP Response:

The CBP will make every effort to ensure that there will be sufficient staff to assist the trade in effectively complying with the regulations. The CBP is aware that effectively administering the advance cargo information program will undoubtedly place upon it additional burdens, especially on some of the smaller ports along the border.

Comment:

Railroads rely extensively on Automated Line Release. The CBP should retain the C–4 Line Release Program (19 CFR part 142, subpart D) for the rail industry; eliminating Line Release would negatively affect carriers participating in Rail AMS as it would delay the time required for rail release.

CBP Response:

For the present, CBP intends to keep some type of Line Release, which might necessitate only some slight changes in names and terms.

Comment:

The CBP should establish procedures to be followed if Rail AMS were not functioning properly when a carrier attempted to file information through the system. Specific backup systems should be des-

ignated in the event of unplanned outages of either CBP's system or the rail carriers' systems.

CBP Response:

The CBP contemplates that the existing procedures of presenting a paper copy of the electronic data elements would still be used, with some adjustments as appropriate.

Comment:

Should an examination of any cargo aboard the incoming train be found warranted, the train should be allowed to proceed to the first inland port where the examination would be conducted.

CBP Response:

Absent special circumstances, all security-related examinations under section 343(a), as amended, would occur at or near the border.

TRANSITION PERIOD FOR COMPLYING WITH ADVANCE CARGO INFORMATION FILING

Comment:

A number of commenters advocated that they be afforded a transition period for complying with the regulations, without specifying what the period should be. One commenter asked for a period of 180 days; another suggested that different periods be allowed for different types of affected parties; and another requested that there be a period similar to the 90-day transition period granted for incoming vessel cargo under the "24-hour rule" (T.D. 02–62, 67 FR 66318; October 31, 2002).

CBP Response:

The CBP, as noted, seeks uniformity and simplicity in its advance cargo reporting rule for rail traffic, and agrees with the recommendation that a 90-day transition period would be adequate under the circumstances, particularly given that the rail industry is highly automated. Hence, a rail carrier would need to begin the electronic transmission to CBP of the required cargo information 90 days from the date that the port of arrival becomes automated.

OVERVIEW; RAIL CARGO DESTINED TO THE UNITED STATES

RAIL CARRIER TRANSMITTAL OF REQUIRED INFORMATION FOR INCOMING CARGO

For any train requiring a train sheet under 19 CFR 123.6, that would have commercial cargo aboard, the rail carrier would be required to electronically present to CBP certain information concern-

ing the incoming cargo no later than 2 hours prior to arrival at a United States port of entry. Specifically, based upon the transition/timetable as discussed below under "Transition Period," to effect the advance electronic transmission of the required rail cargo information to CBP, the rail carrier would have to use a CBP-approved electronic data interchange system. Currently, the CBP-approved automated system for this purpose is the Rail Automated Manifest System (Rail AMS).

As indicated, the current CBP-approved automated system (Rail AMS) for electronically collecting cargo information for incoming rail cargo is programmed and structured to receive cargo data only from the inward rail carrier. Additionally, it is highly practicable and administratively expeditious for CBP to obtain the necessary cargo data from rail carriers as these carriers would already have the most direct contact with CBP, as opposed to the foreign shipper (exporter), a foreign freight forwarder, or the U.S. importer, who could, nevertheless, be more likely to have direct knowledge of particular information involving the incoming cargo. For this latter reason, and as a pre-requisite to accepting the cargo, the carrier would need to receive any necessary cargo information from the foreign shipper and owner of the cargo or from a freight forwarder, as applicable.

Foreign Cargo Transiting the United States

Any foreign cargo arriving by train for transportation in transit across the United States would be subject to the advance electronic information filing requirement for incoming cargo. This includes foreign cargo being transported from one foreign country into another, and cargo arriving by train for transportation through the United States from one point to another in the same foreign country. Further, cargo that was to be unladen from the arriving train and entered, in bond, for exportation, or for transportation and exportation, in another vehicle or conveyance would also be subject to this advance electronic information filing requirement.

Exemption from Filing Mandate; Domestic Cargo Transiting Foreign Country

With respect to incoming rail cargo, CBP believes that, as a general proposition, exemptions from the advance electronic filing requirements would unduly complicate the administration of the program. In consideration of the fairly abbreviated time frame for transmitting the electronic cargo information, CBP finds that a basic, uniformly-imposed advance filing requirement would occasion only minimal disruption to cross-border commerce in the rail environment.

Nevertheless, domestic cargo that would arrive by train at one port from another in the United States after transiting a foreign

country would not be subject to the advance electronic information filing requirement for incoming cargo; however, advance information for such domestic cargo could be electronically presented to CBP, if desired.

SPECIFIC INFORMATION REQUIRED FROM THE CARRIER

The rail carrier must electronically present to CBP the following cargo shipment information for all incoming cargo, as outlined above, that would arrive in the United States by train:

(1) The rail carrier identification SCAC code (the unique Standard Carrier Alpha Code assigned for each carrier by the National Motor Freight Traffic Association; see 19 CFR 4.7a(c)(2)(iii));

(2) The carrier-assigned conveyance name, equipment number and trip number;

(3) The scheduled date and time of arrival of the train at the first port of entry in the United States;

(4) The numbers and quantities of the cargo laden aboard the train as contained in the carrier's bill of lading, either master or house, as applicable (this means the quantity of the lowest external packaging unit; containers and pallets do not constitute acceptable information; for example, a container holding 10 pallets with 200 cartons should be described as 200 cartons);

(5) A precise description (or the Harmonized Tariff Schedule (HTS) numbers to the 6-digit level under which the cargo is classified if that information is received from the shipper) and weight of the cargo; or, for a sealed container, the shipper's declared description and weight of the cargo (generic descriptions, specifically those such as "FAK" ("freight of all kinds"), "general cargo," and "STC" ("said to contain") are not acceptable);

(6) The shipper's complete name and address, or identification number, from the bill(s) of lading (this means the actual owner (exporter) of the cargo from the foreign country; listing a freight forwarder or broker under this category is not acceptable; the identification number will be a unique number to be assigned by CBP upon the implementation of the Automated Commercial Environment);

(7) The complete name and address of the consignee, or identification number, from the bill(s) of lading (The consignee is the party to whom the cargo will be delivered in the United States. However, in the case of cargo shipped "to the order of [a named party]," the carrier must identify this named "to order" party as the consignee; and, if there is any other commercial party listed in the bill of lading for delivery or contact purposes, the carrier must also report this other commercial party's identity and contact information (address/phone number) in the "Notify Party" field of the advance electronic data

transmission to CBP, to the extent that the CBP-approved electronicdata interchange system is capable of receiving this data. The identification number will be a unique number assigned by CBP upon implementation of the Automated Commercial Environment);

(8) The place where the rail carrier takes possession of the cargo shipment;

(9) Internationally recognized hazardous material code when such materials are being shipped by rail;

(10) Container numbers (for containerized shipments) or the rail car numbers; and

(11) The seal numbers for all seals affixed to containers and/or rail cars, to the extent that the electronic system can accept this information (currently, Rail AMS only has the capability to accept two seal numbers per container; the electronic presentation of up to two seal numbers for each container would be considered as constituting full compliance with this data element).

ELECTRONIC FREIGHT STATUS NOTIFICATIONS

If the party holding the goods was automated, that party would have to honor all freight status notifications transmitted by CBP. Cargo could not be transferred to a facility, moved under the provisions of the in-bond regulations or released to the consignee except upon electronic status notifications from CBP.

TRANSITION PERIOD

The CBP will be automating any existing port that currently is not able to receive or transmit electronic information through the CBP-approved electronic data interchange system. There are currently up to 12 ports, most of them Permit Ports, that would require automation and training for CBP staff who are unfamiliar with the electronic data interchange system. Rail carriers would have to commence the advance electronic transmission to CBP of the required cargo information on and after 90 days from the date that CBP publishes a notice in the **Federal Register** informing affected carriers that Rail AMS is in place and operational at the port of entry where the train would initially arrive in the United States.

ELECTRONIC SYSTEM FAILURE; DOWNTIME

Should the automated system fail, after going online, existing procedures, with some adjustments, if necessary, would be used for presenting a hard copy equivalent of the electronic documentation to CBP.

PUBLIC COMMENTS; TRUCK CARGO DESTINED TO THE UNITED STATES

SUMMARY OF PRINCIPAL COMMENTS

The following comments were received regarding the procedures for advance reporting of inbound cargo information for trucks:

1. Any provision for pre-reporting information for inbound truck cargo should be pre-arrival, rather than pre-lading; and it was variously recommended that such notification be required no earlier than either 15 minutes or 30 minutes prior to reaching the port of arrival in the United States. These time frames are necessary to account for the "just-in-time" delivery systems that have been developed around land border operations.

2. To accomplish the electronic transmission of the requisite data to CBP, on an interim basis, pending the establishment of the electronic truck multi-modal manifest system in the Automated Commercial Environment (ACE), the trade should be able to satisfy the pre-notification requirements of the statute by using existing systems/programs, such as PAPS (the Pre-Arrival Processing System), BRASS (the Border Release Advanced Screening and Selectivity program, and FAST (the Free and Secure Trade program). In particular, CBP should take into consideration the importance of the role of the BRASS system in expediting the flow of traffic at the land borders.

No new information-submission systems should be initiated or imposed during the interim period. The proposed pre-reporting provisions should be uniform for all ports on the U.S./Canada as well as the U.S./Mexico borders. Filers should not be held liable for incorrect/incomplete information supplied by others.

3. There should be transition periods for implementing advance cargo information transmissions for the trucking industry that would take into account the fact that the industry has, at present, multiple sectors with varying, limited degrees of automation; indeed, much of the trucking trade on the U.S./Mexico border is currently not automated. Further, a contingency plan for handling shipments arriving without any pre-notification should be created and publicized.

4. CBP should expand its hours of operation to 24 hours a day, seven days a week and have sufficient staffing to perform any inspections during those hours.

5. Participation in special programs such as the Customs-Trade Partnership Against Terrorism (C–TPAT) should be taken into account by CBP and CBP should work with the Canadian government under the Shared Border Accords to arrive at common procedures and requirements to ease the burden on the trade.

CBP Response:

Taking into account the flexibility provided by the Trade Act (e.g., developing interim measures based on existing technology to enable CBP to identify high-risk shipments), CBP agrees that, on an interim basis, existing systems, especially the Free and Secure Trade (FAST) system, will be employed, being enhanced and adapted as appropriate, to effect the advance presentation of the necessary commodity and carrier information for inbound truck cargo, as a prelude to the creation and activation of the Truck Manifest module in ACE. (The Truck Manifest module in ACE will be the subject of a separate notice in the **Federal Register**.) However, regardless of what actual program(s)/procedure(s) may be employed at any given time or place to comply with the pre-arrival information filing requirements of section 343(a), as amended, the regulations, for uniformity and continuity, will simply reflect that the required data elements must be presented through a CBP-approved electronic data interchange system.

INTERIM MEASURES

As indicated, until the development of the Truck Manifest Module in ACE, CBP will employ existing systems on both the Northern and Southern borders to receive and evaluate information for incoming truck shipments. These systems are FAST, PAPS (which uses the Automated Broker Interface (ABI)), BRASS (which would be modified as necessary), and CAFES (the Customs Automated Forms Entry System) or ABI in-bond reporting.

The Pre-Arrival Processing System (PAPS) is a method of speeding the release of Border Cargo Selectivity or regular Cargo Selectivity entries on the land border. The shipment data required to submit an entry through the Automated Broker Interface (ABI) must be provided to the entry filer by the shipper or the carrier or other trade partner in advance of the conveyance arrival. Also included in that ABI data is the Pro-Bill or Bill of Lading assigned to the shipment by the carrier and the Standard Carrier Alpha Code (SCAC) assigned to the carrier. That code and number is submitted through ABI to CBP by the entry filer. The carrier provides the driver with a bar-coded representation of that information to accompany the paper inward manifest (CF 7533) and invoices. The CBP inspector uses that bar-code to retrieve the electronic record and targeting results in the automated system. The carrier can then be processed without the necessity of stopping at the entry filer's office and be released from either the primary truck inspection booth or from the cargo examination facility.

The advance transmission, via fax or other means, of the SCAC/Pro-bill number from the carrier or shipper to the filer eliminates the requirement of any return communication from the filer to the

carrier. The submission of the ABI data in advance of arrival eliminates the need for carriers to park in an import lot and spend additional time at an entry filer's office; traffic congestion decreases and efficiencies in the release process increase.

The electronic filer would have to present commodity and transportation information to CBP for the subject cargo no later than either 30 minutes or 1 hour prior to the carrier's arrival at a United States port of entry, depending upon the specific CBP-approved system employed in transmitting the required data, with the exception of CAFES and BRASS, as described below. This 30-minute or 1-hour period would be measured by the time that CBP receives the information, as opposed to the time that the electronic filer transmits the information for the cargo. The CBP believes that this time period, in relation to the particular automated system used, would be the minimum period needed to perform a targeting analysis for cargo selectivity, and, if found warranted, to arrange for an inspection or examination of the cargo following its arrival. This advance cargo information reporting requirement would thus be the same at all ports, depending on the approved system used to present the cargo information to CBP.

Specifically, in this latter respect, under the Free and Secure Trade (FAST) system, the electronic filer would have to present commodity and transportation information to CBP for the subject cargo no later than 30 minutes prior to the carrier's arrival at a United States port of entry. The CBP believes that FAST shipments can be screened and targeted, as appropriate, with less advance notification than would otherwise be necessary, because of the prior screening incurred by the parties to the FAST transaction, including the driver. However, under PAPS or ABI-in bond reporting, the required cargo data would need to be presented no later than 1 hour prior to arrival at the U.S. port of entry. By contrast, for CAFES and BRASS (as modified), given the limitations of these systems, the necessary information would be submitted upon arrival at the first port of entry.

The only system currently in effect that allows carrier transmission of data electronically to CBP is FAST, with respect to those transactions that have data submitted totally through an electronic interface with CBP. Other participants in FAST have the electronic shipment data transmitted via the entry filer in the Automated Broker Interface (ABI) system of the Automated Commercial System (ACS), while the carrier/driver presents a paper manifest for the goods on the conveyance. In either case, the driver must be a registered driver in the FAST Driver Registration Program. Under the FAST system, the electronic filer would need to present cargo data to CBP no later that 30 minutes prior to the carrier's arrival at a U.S. port of entry.

Additionally, CBP acknowledges the role that BRASS (formerly Line Release (19 CFR part 142, subpart D)) plays in the expeditious

movement of cargo on the land border. However, the current methodology utilized in BRASS for trucks does not allow for an advance electronic notice prior to arrival. The BRASS system is, and remains, heavily based upon the presentation of paper manifests, invoices and C–4 bar code labels (19 CFR 142.43(b)). It is observed, though, that CBP has already instituted an electronic form of BRASS in the Rail Automated Manifest System, and intends to do the same with the introduction of a Truck Automated Manifest System in ACE. In the interim, CBP intends to allow the continuation of BRASS for trucks, but may institute some additional requirements or otherwise modify BRASS in order to increase the security of BRASS transactions.

The CBP proposes a gradual transition from the reliance on the paper based BRASS release system. With the incorporation of a fully electronic version of BRASS planned in the new automated truck manifest scheduled for delivery under the Automated Commercial Environment (ACE), CBP does not propose making any changes to the method in which the current paper based BRASS operates. A gradual reduction in the parties eligible to utilize the existing paper based BRASS system is planned, with limitations in participation based on concerns of other government agencies, the level of compliance within past BRASS shipments and the volume of usage over the course of the preceding year. Additionally, CBP will take measures considered necessary to ensure the security of the BRASS program by incorporating voluntary program requirements such as FAST Driver registration and participation in the Customs-Trade Partnership Against Terrorism.

Moreover, for in-bond shipments transiting the United States that arrive by truck, as an interim procedure, CBP will also make use of those systems that are currently available, since the necessity for screening advance data for in-bond truck shipments must be addressed while awaiting future automated systems in the truck environment. In particular, the Customs Automated Forms Entry System (CAFES) will be utilized to prepare the Customs Form (CF) 7512 in-bond document at all land border crossings where no other automation is available for in-bond shipments. While this capability does not include advance notice of the details of a shipment, it does include automated screening when the shipment arrives and is processed by CBP. As an alternative, carriers or their agents may use the Automated Broker Interface (ABI) to transmit in-bond information for shipments arriving by truck.

INTERIM TRANSITION PERIODS

Furthermore, CBP recognizes the merit, and necessity, of affording suitable transition periods for implementing the regulations for inward truck cargo. To this effect, CBP proposes that cargo information be filed electronically for truck cargo that would arrive at a

United States port of entry on and after 90 days from the date that CBP has published a notice in the **Federal Register** informing affected carriers that:

(1) The approved data interchange is in place and fully operational at that port; and

(2) The carrier must commence the presentation of the required advance cargo information through the approved system.

During these interim periods, however, if CBP suspected that goods were being routed in an attempt to evade advance scrutiny at an automated United States port of arrival, those goods would very likely be treated as high risk upon their arrival at a non-automated port.

MANDATORY FILING BY TRUCK CARRIER; VOLUNTARY IMPORTER PARTICIPATION

Under the proposed pre-notification program, the incoming truck carrier would be obliged to submit all essential information to CBP within the designated time period. However, the United States importer, or its Customs broker, if electing to do so, could instead timely file with CBP any required commodity and other data that it possessed in relation to the cargo. Such information would likely be directly known by the importer or its broker. If the importer or broker did elect to file the commodity data with CBP, the carrier would have to present the required data pertaining to the transportation of the cargo. Such information would, of course, be best known by the carrier.

In any event, should the electronic filer of the cargo information receive any of this information from another party, the law mandates that where the electronic filer is not reasonably able to verify the information received, the regulations must allow the filer to transmit the information based on what it reasonably believes to be true. The CBP has expressly included this mandate in the proposed regulations.

The CBP will make every effort to ensure that there will be sufficient staff to assist the trade in effectively complying with the regulations. The CBP is aware that effectively administering the advance cargo information program will undoubtedly place additional burdens upon it, especially on some of the smaller ports along the border.

Finally, CBP will not propose a contingency plan for handling cargo that is not pre-reported in accordance with the regulations; once implemented at a port, the advance reporting provisions would be mandatory for all required cargo. For any inward cargo for which advance electronic commodity and transportation information was not presented to CBP, as otherwise required in the regulations, the transporting carrier could be refused admission to the United States, or be denied a permit to unlade such cargo.

OVERVIEW; TRUCK CARGO DESTINED TO THE UNITED STATES

TRANSMITTAL OF REQUIRED INFORMATION FOR INCOMING CARGO

For any truck required to report its arrival under 19 CFR 123.1(b), that will have commercial cargo aboard, CBP must electronically receive from the inbound truck carrier, and from the United States importer, or its Customs broker, if they choose to do so, certain information concerning the incoming cargo. Except as provided for BRASS and CAFES under the previous section concerning "Interim Measures," CBP must receive such cargo information by means of a CBP-approved electronic data interchange system no later than either 30 minutes (for FAST) or 1 hour (for PAPS and ABI in-bond reporting) prior to the carrier's arrival at a United States port of entry.

FOREIGN CARGO TRANSITING THE UNITED STATES

For foreign cargo transiting the United States in-bond, as an interim measure, CBP intends to employ CAFES or ABI in-bond reporting when either of these systems is available at the given port of arrival. In addition, any foreign cargo arriving by truck for transportation in transit across the United States would be subject to the advance electronic information filing requirement for incoming cargo when the Truck Manifest module in the Automated Commercial Environment (ACE) is implemented and made mandatory at the port of arrival. This reporting requirement for in-transit cargo would include foreign cargo being transported by truck from one foreign country to another (19 CFR 123.31(a)), and cargo being transported from point to point in the same foreign country (19 CFR 123.31(b); and 19 CFR 123.42). Further, cargo that is to be unladen from the arriving truck and entered, in bond, for exportation, or for transportation and exportation, in another vehicle or conveyance would also be subject to this advance electronic information filing requirement, either under CAFES or ABI in-bond reporting, or under ACE when it is implemented and made mandatory at the port of arrival. However, as previously observed, the implementation of ACE will be the subject of a future **Federal Register** notice.

EXEMPTIONS; DOMESTIC CARGO TRANSITING FOREIGN COUNTRY; CERTAIN INFORMAL ENTRIES

By contrast, domestic cargo transported by truck to one port from another in the United States by way of a foreign country (19 CFR 123.21; and 19 CFR 123.41) is not subject to the advance electronic filing requirement for incoming cargo. However, such information may be electronically transmitted in advance to CBP, if desired, when the electronic cargo information system is made available at the port of arrival.

Similarly, the following merchandise would be exempt from the advance cargo information reporting requirements under this proposed rule, to the extent that such merchandise qualifies for informal entry pursuant to part 143, subpart C, Customs Regulations (19 CFR part 143, subpart C): (1) Merchandise which may be informally entered on Customs Form (CF) 368 or 368A (cash collection or receipt); (2) Goods, unconditionally or conditionally free, not exceeding $2,000 in value, that are eligible for entry under CF 7523; and (3) Products of the United States being returned, for which entry is prescribed on CF 3311. In these instances, the paper entry document alone would serve as both the manifest and entry.

AFFECTED PARTIES

The incoming truck carrier must present the required commodity and transportation information in advance to CBP electronically via the CBP-approved electronic data interchange, currently through FAST, PAPS, BRASS (modified as necessary), CAFES or ABI in-bond reporting, and, when available, through ACE. However, the United States importer, or its Customs broker, if choosing to do so, may instead electronically submit to CBP, within the designated time period, that portion of the required information that it possesses in relation to the cargo. Where the importer, or broker, elects to file a portion of the cargo information, the carrier would be responsible for timely presenting to CBP the remainder of the required data.

SPECIFIC INFORMATION REQUIRED

The cargo data elements that would need to be presented electronically to CBP, on an interim basis, are those data elements that are currently required under FAST. The anticipated data elements for electronic submission under ACE have not been completely finalized yet. The data elements that would be required under ACE will be identified at a future date pursuant to a future **Federal Register** notice.

Accordingly, the following commodity and transportation information, as applicable, would have to be electronically transmitted to and received by CBP for all required incoming cargo arriving in the United States by truck, to the extent that the particular CBP-approved electronic data interchange system employed can accept this information:

(1) Conveyance number, and (if applicable) equipment number (the number of the conveyance is its Vehicle Identification Number (VIN) or its license plate number and state of issuance; the equipment number, if applicable, refers to the identification number of any trailing equipment or container attached to the power unit);

(2) Carrier identification (this is the truck carrier identification SCAC code (the unique Standard Carrier Alpha Code) assigned for

each carrier by the National Motor Freight Traffic Association; see 19 CFR 4.7a(c)(2)(iii));

(3) Trip number and, if applicable, the transportation reference number for each shipment (the transportation reference number is the freight bill number, or Pro Number, if such a number has been generated by the carrier);

(4) Container number(s) (for any containerized shipment) (if different from the equipment number), and the seal numbers for all seals affixed to the equipment or container(s);

(5) The foreign location where the truck carrier takes possession of the cargo destined for the United States;

(6) The scheduled date and time of arrival of the truck at the first port of entry in the United States;

(7) The numbers and quantities for the cargo laden aboard the truck as contained in the bill(s) of lading (this means the quantity of the lowest external packaging unit; containers and pallets do not constitute acceptable information; for example, a container holding 10 pallets with 200 cartons should be described as 200 cartons);

(8) The weight of the cargo, or, for a sealed container, the shipper's declared weight of the cargo;

(9) A precise description of the cargo or the Harmonized Tariff Schedule (HTS) numbers to the 6-digit level under which the cargo will be classified (Generic descriptions, specifically those such as FAK ("freight of all kinds"), "general cargo," and "STC" ("said to contain") are not acceptable);

(10) Internationally recognized hazardous material code when such cargo is being shipped by truck;

(11) The shipper's complete name and address, or identification number, from the bill(s) of lading (this is the actual shipper (the owner and exporter) of the cargo from the foreign country; the identification number will be a unique number to be assigned by CBP upon the implementation of the Automated Commercial Environment); and

(12) The complete name and address of the consignee, or identification number, from the bill(s) of lading (this is the party to whom the cargo will be delivered in the United States, with the exception of "FROB" (Foreign Cargo Remaining On Board); the identification number will be a unique number assigned by CBP upon implementation of the Automated Commercial Environment).

TRANSITION/TIMETABLE FOR COMPLIANCE

The incoming truck carrier and, if electing to do so, the United States importer, or its Customs broker, must present the advance electronic cargo data to CBP, as discussed above, at the particular port of entry where the truck will arrive in the United States on and after 90 days from the date that CBP has published a notice in the **Federal Register** informing affected carriers that:

(1) The approved data interchange is in place and fully operational at that port; and

(2) The carrier must commence the presentation of the required advance cargo information through the approved system.

COMMENTS; CARGO DEPARTING FROM THE UNITED STATES; ALL MODES

The following comments were received regarding the electronic submission of cargo data for outbound shipments.

SETTING TRANSMITTAL TIMES FOR ELECTRONICALLY PRESENTING INFORMATION

Comment:

The time frames proposed by Customs were too long, would significantly impede or eliminate Just-in-Time ("JIT") business practices, and impede or eliminate express shipping services.

CBP Response:

The pre-departure filing time frames set forth in this proposed rule for export cargo information reporting are far shorter than the 24-hour period prior to lading that was included in the "strawman" proposals. As previously indicated, the time frames set forth in the "strawman" proposals were only intended to stimulate feedback from the trade, for consideration by CBP in formulating time frames for presenting the required cargo data under this proposed rule. The time frames proposed in this rule, discussed in further detail below, range from 24 hours prior to departure for vessels to not later than 1 hour prior to departure for trucks.

In determining the time frames for the advance reporting of information for outbound cargo in this proposed rule, CBP considered existing commercial practices. The CBP also took into account the minimum amount of time necessary to perform automated targeting and analysis and to request further information about the cargo or to schedule its examination, in the event that a shipment were identified as being potentially high-risk. The CBP also considered the different threats to the United States and others posed by outbound shipments. It is anticipated that these time frames are sufficiently abbreviated that there will be no palpable impact on "JIT" business/inventory practices.

Comment:

The reporting time frames should be based on when the electronic filer transmits the information, as opposed to when the Government-administered automated system verifies the receipt of the transmitted information.

CBP Response:

There is no mechanism in the approved electronic data interchange system (currently, the Automated Export System (AES)) for capturing the date and time of submission by the filer. The time of receipt is quantified by the time that an Internal Transaction Number (ITN) is generated, and the system records this date and time.

The AES has an Office of Management and Budget (OMB) performance measure for 2003 which sets the goal of monitoring and tuning trade processing to maintain the average monthly percent of filer transmissions with a turnaround time below one minute at 95%. The AES consistently meets this new performance measure. The CBP cannot monitor compliance and/or perform enforcement based on the date and time of submission by the filer.

LOAD/NO LOAD MESSAGES

Comment:

The trade expressed the need for both a "No Load" message, and an "OK to Load" message for both imports and exports.

CBP Response:

The CBP sees "No Load" situations for exports as an extremely infrequent occurrence. Therefore, a constant stream of "OK to Load" messages would not be useful to the export process.

The AES Commodity module, which will be used to meet the Trade Act mandate, currently does not have the capability to provide an automated "No Load" or "Hold" message to the carrier. The AES Commodity module does provide feedback to the United States Principal Party in Interest (USPPI) or its authorized filing agent in the form of warning messages for data inconsistencies as well as for data errors in cases where the system cannot accept the data as transmitted. (The CBP will use the term "USPPI," as defined in 15 CFR part 30; the term "Exporter" will not be used again in this document.) A "No Load" message transmitted to the USPPI or its filing agent is not the most efficient notification path for denying lading to a specific shipment. A "No Load" message will be feasible when export manifest modules for all modes are in place in AES.

At the time of promulgation of a final rule in this matter, automated manifest options will not be available for air, truck, and rail modes in AES. For the purposes of this rulemaking, pursuant to the Trade Act of 2002, CBP has determined that the option of waiting for the availability of automated export manifest systems in AES does not meet the intent of the Trade Act to improve cargo safety and security in the near term. Accordingly, should export manifest modules not be available upon the effective date of a final rule in this matter, CBP proposes to collect the following 6 transportation data elements for outbound cargo, which should otherwise be readily known to the

USPPI or its authorized agent, as further discussed, *infra*: Mode of transportation; Carrier identification; Conveyance name; Country of ultimate destination; Estimated date of exportation; and Port of exportation.

EXEMPTIONS; RETENTION OF POST-DEPARTURE FILING

Comment:

The trade strongly supported retaining the Option 4 Post-Departure filing privilege.

CBP Response:

The CBP supports a structured system of exemptions and/or pre-approval programs that recognize the varying degrees of risk associated with export shipments and the different threats posed to the United States and others by such shipments. Given the differences in in-bond and export shipments, a limited post-departure filing option may be appropriate for certain types of export shipments. The CBP will work with the Bureau of Census and the trade in designing these programs, building upon current initiatives such as AES Option 4, the Customs-Trade Partnership Against Terrorism (C–TPAT), and the Transportation Security Administration's (TSA's) "Known Shipper" Program. The C–TPAT is a joint government-business initiative designed to enhance security procedures over the entire supply chain of incoming cargo while improving the flow of trade. In return for tightening the security of their supply chains, C–TPAT participants can get their cargo processed through CBP faster.

At the present time, while not exempting any USPPI from the advance pre-departure cargo information reporting requirements, this rulemaking supports post-departure reporting by highly compliant exporters. The CBP and Census will develop and implement changes to post-departure reporting jointly, and as appropriate.

Comment:

The trade indicated a need for priority/exemption for a range of commodities and transaction types. Examples of commodities proposed for exemption were bulk cargo, perishables, and human organs/perishable medical products. Related or "twin plant" shipments were also suggested as candidates for exemption.

CBP Response:

The CBP is not planning to eliminate exemptions or pre-approval programs in regulations promulgated pursuant to the Trade Act. The CBP agrees with the exemption of select export shipments such as human organs, perishable medical supplies, and emergency humanitarian aid. As such, the scope of future exemptions and the require-

ments for participation in low-risk exporter programs for reporting export commodity data will be determined jointly by CBP and Census.

INTERNAL TRANSACTION NUMBER;
EXTERNAL TRANSACTION NUMBER

Comment:

The External Transaction Number (XTN) was preferred by most of those who commented. The XTN is generated by the USPPI or its authorized agent who transmits the electronic data. At the same time, some support in the trade community was expressed for the Internal Transaction Number (ITN), and there was near unanimity that CBP should not require reporting of both numbers. The ITN is the AES system-generated number that indicates that the transmission of required export cargo information has been received and accepted through the system.

CBP Response:

The preference for the XTN is understandable, but because an XTN can be generated and annotated on export documents without transmitting shipment data to AES, the XTN is susceptible to abuse. This assertion is supported by a 60-day AES exemption statement survey conducted by CBP during the summer of 2002. Then Customs (now CBP) field locations nationwide audited over 13,000 AES exemption statements and found 25% to be invalid at the time of export. Therefore, CBP's position will be to require that the ITN number be annotated on the appropriate export documents for shipments which require full pre-departure reporting. However, CBP wishes to especially emphasize in this regard that the annotation of the ITN number on any export documentation will not be required or enforced until the implementation of the redesign of the AES commodity module, which is anticipated to be completed in mid 2004.

The ITN provides a link to a create date and time for the record in AES from which to verify compliance with pre-departure filing requirements. The ITN is also consistent in format, starting with an "X", followed by an 8-position date (century, year, month, day) and a 6-position sequential number that is assigned by the AES system. In addition, the AES mainframe typically returns the ITN in less than one minute.

By contrast, External Transaction Numbers (XTNs) consist of the 9-digit electronic filer identification and a Shipment Reference Number (SRN) that are separated by a hyphen. The SRN may contain up to 17 letters, numbers and symbols, allowing for a longer format with more variability than the ITN.

The CBP notes that ITNs will not be required for shipments authorized for post-departure (currently AES Option 4) reporting of ex-

port cargo information. The post-departure filing citation annotated on export documentation will continue to conform to approved formats contained in the Bureau of Census Foreign Trade Statistics Regulations (FTSR) (15 CFR part 30).

The CBP recognizes conditions under which ITNs will not be available due to a failure of an automated system. Procedures for dealing with system downtime—where the Government's electronic system and/or the USPPI's system for receiving and processing export cargo data fails—will be detailed in the Automated Export System Trade Interface Requirements handbook (AESTIR), and any successor publication. The AESTIR is available on the CBP web site (www.cbp.gov).

OVERVIEW; CARGO DEPARTING FROM THE UNITED STATES; ALL MODES

OUTWARD CARGO INFORMATION REPORTING; SYSTEM TO BE UUSED

To ensure the safety and security of cargo that would be sent from the United States, as mandated by section 343(a), as amended, CBP would use the existing approved electronic data interchange system for receiving export commodity data from the United States Principal Party in Interest (USPPI). The current system being used for this purpose is called the Automated Export System (AES).

The CBP has elected, in consultation and cooperation with the Bureau of Census, to utilize the commodity module of the AES (the automated Shipper's Export Declaration), to meet the mandate of the Trade Act. At such time as automated manifest modules are available for all modes, these enhanced capabilities will be reviewed to determine additional compliance with the Trade Act of 2002.

This is a considered decision recognizing that at the time of promulgation of the final rule under section 343(a), as amended, the filing of export data via the AES will not be mandatory. In short, it is intended that the final rule in this matter for the advance filing of cargo information for all reportable outbound shipments not be implemented until Bureau of Census regulations under the Security Assistance Act (Public Law 107–228) are implemented.

Since the inception of AES, the elimination of the paper Shipper's Export Declaration (SED) has been the ultimate goal, and with the passage of the Security Assistance Act, the Bureau of Census has the authority to mandate the electronic filing of all reportable export shipments, with promulgation of regulations planned for mid 2004. Prior to mandatory electronic filing for all reportable export shipments, the Department of Commerce, Bureau of Census, will publish a rule requiring mandatory electronic reporting for commodities on the Commerce Control List (CCL), and U.S. Munitions List (USML), planned for the summer of 2003.

The CBP, however, does intend to accomplish several things with this rulemaking:

(1) Articulate a commitment to strengthening export reporting processes in concert with external agency partners such as the Department of Commerce (the Bureau of Census and the Bureau of Industry and Security), the Department of State (the Directorate of Defense Trade Controls), the Department of Treasury (Office of Foreign Assets Control), the Department of Transportation, the Drug Enforcement Administration, and the Environmental Protection Agency;

(2) Establish time frames for automated reporting that will support targeting for high risk exports and allow CBP or other Government agencies to respond prior to export; and

(3) Establish the system generated Internal Transaction Number as *the* accepted proof of automated filing, for all reportable exports not eligible for exemption.

Utilizing the automated SED within the AES combined with mandatory filing under Census complies with the intent of the Trade Act to collect advance cargo information electronically from the party with the best knowledge of that information. Under current automated practices, the USPPI or its authorized agent has the capability to transmit export information electronically, and with limited exceptions, has knowledge of the data transmitted.

TIME FRAMES FOR PRESENTING INFORMATION

A USPPI, or its authorized agent, participating in advance cargo information filing would have to present export cargo information through the AES commodity module for outbound shipments, as follows:

(1) For vessel cargo, the participating USPPI or its authorized agent must transmit and verify system acceptance of export vessel cargo information *no later than 24 hours prior to the departure of the vessel*;

(2) For air cargo, including cargo being transported by Air Express Couriers, the participating USPPI or its authorized agent must transmit and verify system acceptance of export air cargo information *no later than 2 hours prior to the scheduled departure time of the aircraft*;

(3) For truck cargo, including cargo departing by Express Consignment Courier, the participating USPPI or its authorized agent must present and verify system acceptance of export truck cargo information *no later than 1 hour prior to the arrival of the truck at the border*; and

(4) For rail cargo, the participating USPPI or its authorized agent must transmit and verify system acceptance of export rail cargo information *no later than 4 hours prior to the time at which the engine is attached to the train to go foreign.*

The preceding time frames are provided by CBP as minimum guidelines. All parties involved in export transactions should be advised that filing electronic cargo information as far in advance as practicable reduces the need for CBP to delay export of that cargo to complete any screening or examinations deemed to be necessary.

The foregoing time frames for reporting information about outbound vessel, air, truck and rail cargo only apply to shipments without an export license, that require full pre-departure reporting of shipment data, in order to comply with the advance cargo information filing requirements under section 343(a), as amended. The USPPI or its authorized agent may refer to proposed § 192.14(e) for specific guidance concerning the effective date for the time frames detailed herein. Requirements placed on exports controlled by other Government agencies will remain in force unless changed by the agency having the regulatory authority to do so. The CBP will also continue to require a 72-hour advance notice for vehicle exports pursuant to 19 CFR 192.2(c)(1) and (c)(2)(i). The USPPI or its authorized agent should refer to the relevant titles in the Code of Federal Regulations for the pre-filing requirements of other Government agencies.

ELECTRONIC FILER OF EXPORT CARGO INFORMATION; PROPOSED REQUIREMENTSrs

The USPPI, or its authorized agent, who participates in reporting export data electronically via the commodity module (the automated Shipper's Export Declaration) of the AES, would continue to transmit and verify that such data had been accepted through the system, but would have to do so no later than the time, in advance of departure, prescribed for each mode of transportation under this proposed rule. The USPPI or its authorized agent may refer to proposed § 192.14(e) for specific information concerning effective dates for procedures outlined herein.

Since the AES Commodity Module already captures the requisite export data, and to avoid redundancy with existing export reporting requirements, no new commodity or transportation data elements would need to be required under section 343(a), as amended. Specifically, the export cargo information collected from USPPIs or their authorized agents is contained in the Bureau of Census electronic Shipper's Export Declaration (SED) that is presented to CBP through the AES. Those export commodity data elements that are required to be reported electronically through AES are also found in § 30.63 of the Bureau of Census Regulations (15 CFR 30.63). The required transportation data elements are defined below in accordance with 15 CFR 30.63.

1. Mode of transportation. The mode of transportation is defined as that by which the goods are exported or shipped (vessel, air, rail, or truck).

2. Carrier identification. The USPPI or its authorized agent should reasonably be expected to know the identification of the carrier that would actually be transporting the merchandise out of the United States. For vessel, rail and truck shipments, the unique carrier identifier would be its 4-character Standard Carrier Alpha Code (SCAC); for aircraft, this identifier would be the 2- or 3-character International Air Transport Association (IATA) code.

3. Conveyance name. The conveyance name would be the name of the carrier (for sea carriers, the name of the vessel; for others, the carrier name).

4. Country of ultimate destination. This is the country as known to the USPPI or its authorized agent at the time of exportation, where the cargo is to be consumed or further processed or manufactured. This country would be identified by the 2-character International Standards Organization (ISO) code for the country of ultimate destination.

5. Estimated date of exportation. The participating USPPI or its authorized agent must report the date the cargo is scheduled to leave the United States for all modes of transportation. If the actual date is not known, the participating USPPI or authorized agent must report the best estimate as to the time of departure.

6. Port of exportation. The port of exportation would be designated by its unique code, as set forth in Annex C, Harmonized Tariff Schedule of the United States (HTSUS).

IDENTIFYING HIGH-RISK SHIPMENTS

The CBP finds that the data elements that the USPPI would have to timely present through AES covering both the commodity and transportation information for outbound cargo should prove to be sufficient for identifying and targeting potentially high-risk shipments. For outbound cargo that CBP has identified as high-risk, the carrier, after being duly notified by CBP, would be responsible for delivering the cargo for inspection/examination; if the cargo identified as high-risk had already departed, CBP would exercise its authority to demand that the cargo be redelivered (see 19 CFR 113.64(g)(2)).

Notably, in the case of outbound cargo, identifying high-risk shipments would principally be concerned with interdicting any attempted illegal export of technology, and associated goods and materials, that could be employed by terrorist organizations abroad in the construction of weapons of mass destruction (WMDs), such as nuclear and radiological dispersal devices ("dirty bombs"), that would be intended ultimately for use either here in the United States or in another country.

PROPOSED REQUIREMENT; CARRIER DATA

The CBP has made a prudent judgment that the transportation

data, along with the commodity data (both collected in the AES Commodity Module), that CBP proposes to require from the participating USPPI or its authorized agent, would be sufficient for effective targeting and risk assessment under section 343(a), as amended.

Additional information for outward cargo is not readily available in advance of departure because exporting carriers, who have direct knowledge of this information, generally do not now have the electronic capability to furnish cargo data through AES. Specifically, there are no carrier manifest modules in AES, except for the vessel carrier module which is voluntary and does not yet include the capability to receive cargo data directly from Non Vessel Operating Common Carriers (NVOCCs). Therefore, implementation of mandatory automated cargo data processes for vessel operators in the absence of other such modules would create uneven requirements within and across modes of transportation.

Conversely, to presently obligate USPPIs or their authorized agents to transmit transportation data additional to that which is collected in the AES Commodity Module would be impracticable because such information would not necessarily otherwise be obtainable in a timely enough manner to meet the proposed advance electronic reporting procedures; this would inevitably delay and disrupt the movement of cross-border traffic.

Against this overall backdrop, therefore, CBP has concluded that its proposal to require pre-existing data elements for outward cargo represents a sound and sensible initial step in establishing a solid informational bulwark against threats to cargo safety and security, and one which would not adversely impact or impinge upon the flow of cross-border commerce.

To this end, and pursuant to Bureau of Census regulations that are due to be issued next year, the current AES system is to be upgraded and reprogrammed so as to enable, and require, that USPPIs or their authorized agents transmit, verify acceptance and annotate an ITN (unless otherwise exempt from pre-departure filing) on export documents presented to the exporting carrier in accordance with the time frames and procedures outlined in this rule. Nevertheless, CBP and the exporting trade agree with the advisability of creating carrier manifest modules in AES or a successor system that would facilitate the reporting of additional cargo information for outbound cargo.

Complete transportation data from exporting carriers would be collected for every export shipment when CBP has the system capabilities set up to receive this data directly from carriers. Once this requisite technology is approved and incorporated into an automated system, CBP will then review these new capabilities to determine additional compliance with the Trade Act of 2002. The CBP would then propose its own regulations in the **Federal Register** calling

for exporting carriers, in advance of departure, to electronically file their outward cargo information with CBP through the approved system.

PROOF OF ELECTRONIC FILING; SYSTEM VERIFICATION OF DATA ACCEPTANCE

For each export shipment to be laden, the participating USPPI, or its authorized agent, must furnish to the outbound carrier a proof of electronic filing citation covering the cargo to be laden, for annotation on the outward manifest, waybill, or other export documentation when cargo information is reported electronically; in the alternative, the USPPI, or authorized agent, would be responsible for providing to the exporting carrier an appropriate low-risk exporter citation (currently Option 4) or an exemption statement for the cargo. The carrier may not load cargo without the related electronic filing citation (*e.g.*, the ITN), low-risk exporter citation, or an appropriate exemption statement.

The proof of electronic filing citation, low-risk exporter citation, or exemption statement, will conform to the approved formats found in the Bureau of Census Foreign Trade Statistics Regulations (FTSR) (15 CFR part 30), or on the Census web site (*www.census.gov/foreign-trade/regulations/index.html*).

When successfully transmitting cargo data for a shipment through the system, the USPPI or its authorized agent will receive a system-generated confirmation number, known as an Internal Transaction Number (ITN), which constitutes verification that the data transmitted has been accepted by the system. For transmitted data that passes system edits, the current approved electronic data interchange (AES) returns this confirmation number routinely in less than one minute. This enables CBP to base the monitoring and enforcement of the time frames on the actual time of receipt (of the data) rather than on its transmission, which cannot be quantified. When the redesign of the AES commodity module is in place, the proof of export filing citation will need to include the ITN.

EXEMPTIONS FROM REPORTING REQUIREMENTS

Exemptions from reporting requirements for certain cargo are under the authority of the Bureau of Census (15 CFR 30.50 through 30.58). The proposed CBP regulations under section 343(a), as amended, would likewise encompass these exemptions.

TRANSITION PERIOD; IMPLEMENTATION

For successfully targeting potentially high-risk export commodity shipments, CBP supports the employment of current AES systems that are already heavily in use and widely available to USPPIs. With Internet connections, as noted, AES allows new USPPIs that are

relatively small businesses, to be brought into the system fairly easily and inexpensively. To this end, the proposed regulations for the specified pre-departure reporting of cargo commodity and transportation information for outbound shipments, together with the requirement of the ITN, would be implemented concurrent with the completion of the redesign of the AES commodity module and the implementation of mandatory filing regulations by the Department of Commerce pursuant to Public Law 107–228.

FUTURE RULEMAKING REGARDING RELATED LAWS

WATERBORNE CARGO; SECTION 343(b), Trade Act of 2002

Section 343(b), Trade Act of 2002, as amended (codified at 19 U.S.C. 1431a), requiring proper documentation for all cargo to be exported by vessel, will be the subject of a separate publication in the **Federal Register**.

TRANSPORTATION SECURITY ADMINISTRATION— CARGO SECURITY PROGRAMS

It is also stressed that the final regulations that will be issued to implement section 343(a), as amended, may, in the foreseeable future, be subject to modification as necessary to accommodate a cargo security program that may be developed by the Transportation Security Administration (TSA) in accordance with the Aviation and Transportation Security Act (Public Law 107–71,115 Stat. 597; November 19, 2001) (49 U.S.C. 114(d), (f)(10); 44901(a), (f)).

COMMENTS

Before adopting these proposed amendments, consideration will be given to any written comments that are timely submitted to Customs and Border Protection (CBP). The CBP specifically requests comments on the clarity of the proposed rule and how it may be made easier to understand. Comments are especially requested as to the sufficiency of the explanations that accompany the proposed data elements, as well as the impact on small business entities under the Regulatory Flexibility Act. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), at the Bureau of Customs and Border Protection, 799 9th Street, NW., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Customs and Border Protection (CBP) has conducted an economic analysis to determine whether the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) would apply to this rulemaking. It has been determined, as a result of the *initial* analysis conducted, that this proposed rule would not have a significant economic impact upon a substantial number of small entities as required by the RFA. This economic analysis is attached as an Appendix to this document. For the reasons set forth in the analysis, the agency does not make a certification at this time with regard to the regulatory requirements of 5 U.S.C. 603 and 604. Also, this rule is a "significant regulatory action" under Executive Order (E.O.) 12866 and has been reviewed by the Office of Management and Budget in accordance with that E.O. However, it is our preliminary determination that the proposed rule would not result in an "conomically significant regulatory action" under E.O. 12866, as regards the impact on the national economy.

PAPERWORK REDUCTION ACT

The collection of information in this document is contained in §§ 4.7a, 122.48a, 123.91, 123.92, and 192.14. Under these sections, the information would be required and used to determine the safety and security conditions under which cargo to be brought into or sent from the United States was maintained prior to its arrival or departure. The likely respondents and/or recordkeepers are air, truck, rail and vessel carriers, Non Vessel Operating Common Carriers (NVOCCs), freight forwarders, deconsolidators, express consignment facilities, importers, exporters, and Customs brokers. The collection of information encompassed within this proposed rule has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

Estimated annual reporting and/or recordkeeping burden: 2,299,640 hours.

Estimated average annual burden per respondent/recordkeeper: 52.3 hours.

Estimated number of respondents and/or recordkeepers: 43,960.

Estimated annual frequency of responses: 14,297,259.

Comments on this collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer of the Department of Homeland Security, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, Bureau

of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, D.C. 20229. Comments should be submitted within the time frame that comments are due on the substance of the proposal.

Comments are invited on: (a) Whether the collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or startup costs and costs of operations, maintenance, and purchase of services to provide information.

Part 178, Customs Regulations (19 CFR part 178), containing the list of approved information collections, would be revised to add appropriate references to the above-cited regulatory sections, upon the adoption of the proposal as a final rule.

LIST OF SUBJECTS

19 CFR PART 4

Administrative practice and procedure, Arrival, Cargo vessels, Common carriers, Customs duties and inspection, Declarations, Entry, Exports, Foreign commerce and trade statistics, Freight, Imports, Inspection, Maritime carriers, Merchandise, Penalties, Reporting and recordkeeping requirements, Shipping, Vessels.

19 CFR PART 103

Administrative practice and procedure, Computer technology, Confidential business information, Electronic filing, Freedom of information, Reporting and recordkeeping requirements.

19 CFR PART 113

Air carriers, Bonds, Common carriers, Customs duties and inspection, Exports, Foreign commerce and trade statistics, Freight, Imports, Reporting and recordkeeping requirements, Vessels.

19 CFR PART 122

Administrative practice and procedure, Advance notice of arrival, Advance notice requirements, Air cargo, Air cargo manifest, Air carriers, Aircraft, Air transportation, Commercial aircraft, Customs duties and inspection, Entry procedure, Foreign commerce and trade statistics, Freight, Imports, Penalties, Reporting and recordkeeping requirements, Security measures.

19 CFR PART 123

Administrative practice and procedure, Aircraft, Canada, Common carriers, Customs duties and inspection, Entry of merchandise, Freight, Imports, International traffic, Mexico, Motor carriers, Railroads, Reporting and recordkeeping requirements, Vehicles, Vessels.

19 CFR PART 192

Administrative practice and procedure, Aircraft, Customs duties and inspection, Exports, Foreign trade statistics, Law enforcement, Motor vehicles, Reporting and recordkeeping procedures, Vehicles, Vessels.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend parts 4, 103, 113, 122, 123, and 192, Customs Regulations (19 CFR parts 4, 103, 113, 122, 123, and 192), as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 would be revised, and the relevant specific authority citations would continue, to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. App. 3, 91;

* * * * * * *

Section 4.7 also issued under 19 U.S.C. 1581(a); 46 U.S.C. App. 883a, 883b;

* * * * * * *

Section 4.61 also issued under 46 U.S.C. App. 883;

* * * * * * *

2. Amend § 4.7 by:

a. Revising the first sentence of paragraph (b)(1);

b. Revising paragraph (b)(2);

c. Removing the words, "if automated", where appearing in paragraph (b)(3)(i);

d. Adding a new paragraph (b)(3)(iii); and

e. Adding a new paragraph (b)(5).

The revisions and additions would read as follows:

§ 4.7 Inward foreign manifest; production on demand; contents and form; advance filing of cargo declaration.

* * * * * * *

(b)(1) With the exception of any Cargo Declaration that has been filed in advance as prescribed in paragraph (b)(2) of this section, the

original and one copy of the manifest must be ready for production on demand. * * *

(2) Subject to the effective date provided in paragraph (b)(5) of this section, and with the exception of any vessel exclusively carrying bulk or authorized break bulk cargo as prescribed in paragraph (b)(4) of this section, Customs and Border Protection (CBP) must receive from the incoming carrier, for any vessel covered under paragraph (a) of this section, the CBP-approved electronic equivalent of the vessel's Cargo Declaration (Customs Form 1302), 24 hours before the cargo is laden aboard the vessel at the foreign port (see § 4.30(n)(1)). The current approved system for presenting electronic cargo declaration information to CBP is the Vessel Automated Manifest System (AMS).

* * * * * * *

(3) * * *

(iii) Where the party electronically presenting to CBP the cargo information required in § 4.7a(c)(4) receives any of this information from another party, CBP will take into consideration how, in accordance with ordinary commercial practices, the presenting party acquired such information, and whether and how the presenting party is able to verify this information. Where the presenting party is not reasonably able to verify such information, CBP will permit the party to electronically present the information on the basis of what the party reasonably believes to be true.

* * * * * * *

(5) Within [90 days of the publication of this paragraph as a final rule in the **Federal Register**], all ocean carriers, and NVOCCs electing to participate, must be automated on the Vessel AMS system at all ports of entry in the United States where their cargo will initially arrive.

* * * * * * *

3. Amend § 4.7a by:
a. Revising paragraphs (c)(4)(viii) and (c)(4)(ix);
b. Removing the word "and" after paragraph (c)(4)(xiii); and
c. Adding new paragraphs (c)(4)(xv) and (c)(4)(xvi).
The revisions and additions would read as follows:

§ 4.7a Inward manifest; information required; alternative forms.

* * * * * * *

(c) *Cargo Declaration.* * * *

(4) * * *

(viii) The shipper's complete name and address, or identification number, from all bills of lading. (At the master bill level, for consolidated shipments, the identity of the Non Vessel Operating Com-

mon Carrier (NVOCC), freight forwarder, container station or other carrier is sufficient; for non-consolidated shipments, and for each house bill in a consolidated shipment, the identity of the actual shipper (the owner and exporter) of the cargo from the foreign country is required; the identification number will be a unique number assigned by CBP upon the implementation of the Automated Commercial Environment);

(ix) The complete name and address of the consignee, or identification number, from all bills of lading. (For consolidated shipments, at the master bill level, the NVOCC, freight forwarder, container station or other carrier may be listed as the consignee. For non-consolidated shipments, and for each house bill in a consolidated shipment, the consignee is the party to whom the cargo will be delivered in the United States, with the exception of "FROB". However, in the case of cargo shipped "to order of [a named party]," the carrier must report this named "to order" party as the consignee; and, if there is any other commercial party listed in the bill of lading for delivery or contact purposes, the carrier must also report this other commercial party's identity and contact information (address/phone number) in the "Notify Party" field of the advance electronic data transmission to CBP, to the extent that the CBP-approved electronic data interchange system is capable of receiving this data. The identification number will be a unique number assigned by CBP upon implementation of the Automated Commercial Environment);

* * * * * * *

(xv) Date of departure from foreign, as reflected in the vessel log; and

(xvi) Time of departure from foreign, as reflected in the vessel log.

* * * * * * *

4. Amend § 4.61 by adding a new paragraph (c)(24) to read as follows:

§ 4.61 Requirements for clearance.

* * * * * * *

(c) *Verification of compliance.*

* * * * * * *

(24) Electronic receipt of required vessel cargo information (see § 192.14(c) of this chapter).

* * * * * * *

PART 103—AVAILABILITY OF INFORMATION

1. The general authority citation for part 103 would continue, and a specific authority citation would be added for § 103.31a in appro-

priate numerical order, to read as follows:

AUTHORITY: 5 U.S.C. 301, 552, 552a; 19 U.S.C. 66, 1624; 31 U.S.C. 9701;

* * * * * * *

Section 103.31a also issued under 19 U.S.C. 2071 note;

* * * * * * *

2. Amend subpart C of part 103 by adding a new § 103.31a to read as follows:

§ 103.31a Advance electronic information for air, truck, and rail cargo.

Advance cargo information that is electronically presented to Customs and Border Protection (CBP) for inbound or outbound air, rail, or truck cargo in accordance with § 122.48a, 123.91, 123.92, or 192.14 of this chapter, is per se exempt from disclosure under § 103.12(d), unless CBP receives a specific request for such records pursuant to § 103.5, and the owner of the information expressly agrees in writing to its release.

PART 113—CUSTOMS BONDS

1. The authority citation for part 113 would continue to read as follows:

AUTHORITY: 19 U.S.C. 66, 1623, 1624.

2. Amend § 113.62 by:

a. Revising the heading of paragraph (j), and redesignating its current text as paragraph (j)(1);

b. Adding a new paragraph (j)(2); and

c. Revising paragraph (l)(1) by adding the citation, "(j)(2),", after the citation, "(i),".

The revision and addition to paragraph (j) read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * * * *

(j) *Agreement to comply with electronic entry and/or advance cargo information filing requirements.* (1) * * *

(2) If the principal elects to provide advance inward air or truck cargo information to Customs and Border Protection (CBP) electronically, the principal agrees to provide such cargo information to CBP in the manner and in the time period required, respectively, under § 122.48a or 123.92 of this chapter. If the principal defaults with regard to these obligations, the principal and surety (jointly and severally) agree to pay liquidated damages of $5,000 for each regulation violated.

* * * * * * *

3. Amend § 113.64 by revising the first sentence of paragraph (a); and by revising paragraph (c) to read as follows:

§ 113.64 International carrier bond conditions.

(a) *Agreement to Pay Penalties, Duties, Taxes, and Other Charges.* If any vessel, vehicle, or aircraft, or any master, owner, or person in charge of a vessel, vehicle or aircraft, slot charterer, or any non-vessel operating common carrier as defined in § 4.7(b)(3)(ii) of this chapter or other party as specified in § 122.48a(c)(2) of this chapter, incurs a penalty, duty, tax or other charge provided by law or regulation, the obligors (principal and surety, jointly and severally) agree to pay the sum upon demand by Customs and Border Protection (CBP). * * *

* * * * * * *

(c) *Non-vessel operating common carrier (NVOCC); other party.* If a slot charterer, non-vessel operating common carrier (NVOCC) as defined in § 4.7(b)(3)(ii) of this chapter, or other party specified in § 122.48a(c)(2) of this chapter, elects to provide advance cargo information to CBP electronically, the NVOCC or other party, as a principal under this bond, in addition to compliance with the other provisions of this bond, also agrees to provide such cargo information to CBP in the manner and in the time period required under those respective sections. If the NVOCC or other party, as principal, defaults with regard to these obligations, the principal and surety (jointly and severally) agree to pay liquidated damages of $5,000 for each regulation violated.

* * * * * * *

PART 122—AIR COMMERCE REGULATIONS

1. The general authority citation for part 122 would be revised to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

* * * * * * *

2. Amend § 122.12 by revising the heading of paragraph (c) and adding a sentence at the end of paragraph (c) to read as follows:

§ 122.12 Operation of international airports.

* * * * * * *

(c) *FAA rules; denial of permission to land.* * * * In addition, except in the case of an emergency or forced landing (see § 122.35), permission to land at an international airport may be denied if ad-

vance electronic information for incoming foreign cargo aboard the aircraft has not been received as provided in § 122.48a.

* * * * * * *

3. Amend § 122.14 by:

a. Redesignating paragraphs (d)(4) and (d)(5) as paragraphs (d)(5) and (d)(6), respectively;

b. Adding a new paragraph (d)(4); and

c. Revising newly redesignated paragraph (d)(5).

The addition and revision would read as follows:

§ 122.14 Landing rights airport.

* * * * * * *

(d) *Denial or withdrawal of landing rights.* * * *

(4) Advance cargo information has not been received as provided in § 122.48a;

(5) Other reasonable grounds exist to believe that Federal rules and regulations pertaining to safety, including cargo safety and security, and Customs, or other inspectional activities have not been followed; or

* * * * * * *

4. Amend § 122.33 by:

a. Revising paragraph (a), introductory text; and

b. Revising paragraph (a)(1).

The revisions read as follows:

§ 122.33 Place of first landing.

(a) The first landing of an aircraft entering the United States from a foreign area will be:

(1) At a designated international airport (see § 122.13), provided that permission to land has not been denied pursuant to § 122.12(c);

* * * * * * *

5. Amend § 122.38 by:

a. Adding a sentence at the end of paragraph (c); and

b. Adding a new paragraph (g).

The additions would read as follows:

§ 122.38 Permit and special license to unlade and lade.

* * * * * * *

(c) *Term permit or special license.* * * * In addition, a term permit or special license to unlade or lade already issued will not be applicable to any inbound or outbound flight, with respect to which Customs and Border Protection (CBP) has not received the advance elec-

tronic cargo information required, respectively, under § 122.48a or 192.14(b)(1)(ii) of this chapter (see paragraph (g) of this section).

* * * * * * *

(g) *Advance receipt of electronic cargo information.* The CBP will not issue a permit to unlade or lade cargo upon arrival or departure of an aircraft, and a term permit or special license already issued will not be applicable to any inbound or outbound flight, with respect to which CBP has not received the advance electronic cargo information required, respectively, under § 122.48a or 192.14 of this chapter. In cases in which CBP does not receive complete cargo information in the time and manner and in the electronic format required by § 122.48a or 192.14 of this chapter, as applicable, CBP may delay issuance of a permit or special license to unlade or lade cargo, and a term permit or special license to unlade or lade already issued may not apply, until all required information is received. The CBP may also decline to issue a permit or special license to unlade or lade, and a term permit or special license already issued may not apply, with respect to the specific cargo for which advance information is not timely received electronically, as specified in § 122.48a or 192.14(b)(1)(ii) of this chapter.

6. Amend § 122.48 by revising paragraph (a) to read as follows:

§ 122.48 Air cargo manifest.

(a) *When required.* Except as provided in paragraphs (d) and (e) of this section, an air cargo manifest need not be filed for any aircraft required to enter under § 122.41. However, an air cargo manifest for all cargo on board together with the general declaration must be kept aboard any aircraft required to enter under § 122.41, for production upon demand.

* * * * * * *

7. Amend subpart E of part 122 by adding a new § 122.48a to read as follows:

§ 122.48a Electronic information for air cargo required in advance of arrival.

(a) *General requirement.* Pursuant to section 343(a), Trade Act of 2002, as amended (19 U.S.C. 2071 note), and subject to paragraph (e) of this section, for any inbound aircraft required to enter under § 122.41, that will have commercial cargo aboard, Customs and Border Protection (CBP) must electronically receive from the inbound air carrier and, if applicable, an approved party as specified in paragraph (c)(1) of this section, certain information concerning the incoming cargo, as enumerated, respectively, in paragraphs (d)(1) and (d)(2) of this section. The CBP must receive such information no later than the time frame prescribed in paragraph (b) of this section.

The advance electronic transmission of the required cargo information to CBP must be effected through a CBP-approved electronic data interchange system.

(1) *Cargo remaining aboard aircraft; cargo to be entered under bond.* Air cargo arriving from and departing for a foreign country on the same through flight and cargo that is unladen from the arriving aircraft and entered, in bond, for exportation, or for transportation and exportation (see subpart J of this part), are subject to the advance electronic information filing requirement under paragraph (a) of this section.

(2) *Diplomatic pouches.* When goods comprising a diplomatic or consular bag (including cargo shipments, containers, and the like) that belong to the United States or to a foreign government are shipped under an air waybill, such cargo is subject to the advance reporting requirements of paragraph (a) of this section.

(b) *Time frame for presenting data.* (1) *Nearby foreign areas.* In the case of aircraft under paragraph (a) of this section that depart for the United States from any foreign port or place in North America, including locations in Mexico, Central America, South America (from north of the Equator only), the Caribbean, and Bermuda, CBP must receive the required cargo information no later than the time of the departure of the aircraft for the United States (no later than the time that wheels are up on the aircraft, and it is en route directly to the United States).

(2) *Other foreign areas.* In the case of aircraft under paragraph (a) of this section that depart for the United States from any foreign area other than that specified in paragraph (b)(1) of this section, CBP must receive the required cargo information no later than 4 hours prior to the arrival of the aircraft in the United States.

(c) *Party electing to file advance electronic cargo data.* (1) *Other filer.* In addition to incoming air carriers for whom participation is mandatory, one of the following parties meeting the qualifications of paragraph (c)(2) of this section, may elect to transmit to CBP the electronic data for incoming cargo that is listed in paragraph (d)(2) of this section:

(i) An Automated Broker Interface (ABI) filer (importer or its Customs broker) as identified by its ABI filer code;

(ii) A Container Freight Station/deconsolidator as identified by its FIRMS (Facilities Information and Resources Management System) code;

(iii) An Express Consignment Carrier Facility as identified by its FIRMS code; or,

(iv) An air carrier as identified by its carrier IATA (International Air Transport Association) code, that arranged to have the incoming air carrier transport the cargo to the United States.

(2) *Eligibility.* To be qualified to file cargo information electronically, a party identified in paragraph (c)(1) of this section must es-

tablish the communication protocol required by CBP for properly presenting cargo information through the approved data interchange system. Also, other than a broker or an importer (see § 113.62(j)(2) of this chapter), the party must possess a Customs international carrier bond containing all the necessary provisions of § 113.64 of this chapter.

(3) *Nonparticipation by other party.* If another party as specified in paragraph (c)(1) of this section does not participate in advance electronic cargo information filing, the party that arranges for and/or delivers the cargo shipment to the incoming carrier must fully disclose and present to the carrier the cargo information listed in paragraph (d)(2) of this section; and the incoming carrier, on behalf of the party, must present this information electronically to CBP under paragraph (a) of this section.

(4) *Required information in possession of third party.* Any other entity in possession of required cargo data that is not the incoming air carrier or a party described in paragraph (c)(1) of this section must fully disclose and present the required data for the inbound air cargo to either the air carrier or other electronic filer, as applicable, which must present such data to CBP.

(5) *Party receiving information believed to be accurate.* Where the party electronically presenting the cargo information required in paragraph (d) of this section receives any of this information from another party, CBP will take into consideration how, in accordance with ordinary commercial practices, the presenting party acquired such information, and whether and how the presenting party is able to verify this information. Where the presenting party is not reasonably able to verify such information, CBP will permit the party to electronically present the information on the basis of what that party reasonably believes to be true.

(d) *Non-consolidated/consolidated shipments.* For non-consolidated shipments, the incoming air carrier must transmit to CBP all of the information for the air waybill record, as enumerated in paragraph (d)(1) of this section. For consolidated shipments: the incoming air carrier must transmit to CBP the information listed in paragraph (d)(1) of this section that is applicable to the master air waybill; and the air carrier must transmit cargo information for all associated house air waybills as enumerated in paragraph (d)(2) of this section, unless another party as described in paragraph (c)(1) of this section electronically transmits this information directly to CBP.

(1) *Cargo information from air carrier.* The incoming air carrier must present to CBP the following data elements for inbound air cargo (an "M" next to any listed data element indicates that the data element is mandatory in all cases; a "C" next to the listed data element indicates that the data element is conditional and must be transmitted to CBP only if the particular information pertains to the inbound cargo):

(i) Air waybill number (M) (The air waybill number is the International Air Transport Association (IATA) standard 11-digit number);

(ii) Trip/flight number (M);

(iii) Carrier/ICAO (International Civil Aviation Organization) code (M) (The approved electronic data interchange system supports both 3- and 2-character ICAO codes, provided that the final digit of the 2-character code is not a numeric value);

(iv) Airport of arrival (M) (The 3-alpha character ICAO code corresponding to the first airport of arrival in the Customs territory of the United States (for example, Chicago O'Hare = ORD; Los Angeles International Airport = LAX));

(v) Airport of origin (M) (The 3-alpha character ICAO code corresponding to the airport from which a shipment began its transportation by air to the United States (for example, if a shipment began its transportation from Hong Kong (HKG), and it transits through Narita, Japan (NRT), en route to the United States, the airport of origin is HKG, not NRT));

(vi) Scheduled date of arrival (M);

(vii) Total quantity based on the smallest external packing unit (M) (for example, 2 pallets containing 50 pieces each would be considered as 100, not 2);

(viii) Total weight (M) (may be expressed in either pounds or kilograms);

(ix) Precise cargo description (M) (for consolidated shipments, the word "Consolidation" is a sufficient description for the master air waybill record; for non-consolidated shipments, a precise cargo description or the 6-digit Harmonized Tariff Schedule (HTS) number must be provided (generic descriptions, specifically those such as "FAK" ("freight of all kinds"), "general cargo", and "STC" ("said to contain") are not acceptable));

(x) Shipper name and address (M) (for consolidated shipments, the identity of the consolidator, express consignment or other carrier, is sufficient for the master air waybill record; for non-consolidated shipments, the identity of the actual shipper (who is the owner and exporter) of the merchandise from the foreign country is required);

(xi) Consignee name and address (M) (for consolidated shipments, the identity of the container station, express consignment or other carrier is sufficient for the master air waybill record; for non-consolidated shipments, the name and address of the party to whom the cargo will be delivered is required, with the exception of "FROB" (Foreign Cargo Remaining On Board));

(xii) Consolidation identifier (C);

(xiii) Split shipment indicator (C) (this data element includes information indicating the particular portion of the split shipment that will arrive; the boarded quantity of that portion of the split

shipment (based on the smallest external packing unit); and the boarded weight of that portion of the split shipment (expressed in either pounds or kilograms));

(xiv) Permit to proceed information (C) (this element includes the permit-to-proceed destination airport (the 3-alpha character ICAO code corresponding to the permit-to-proceed destination airport); and the scheduled date of arrival at the permit-to-proceed destination airport);

(xv) Identifier of other party which is to submit additional air waybill information (C);

(xvi) In-bond information (C) (this data element includes the destination airport; the international/domestic identifier (the in-bond type indicator); the in-bond control number, if there is one (C); and the onward carrier identifier, if applicable (C)); and

(xvii) Local transfer facility (C).

(2) *Cargo information from carrier or other filer.* The incoming air carrier must present the following additional information to CBP for the incoming cargo, unless another party as specified in paragraph (c)(1) of this section elects to present this information directly to CBP. Information for all house air waybills under a single master air waybill consolidation must be presented electronically to CBP by the same party. (An "M" next to any listed data element indicates that the data element is mandatory in all cases; a "C" next to any listed data element indicates that the data element is conditional and must be transmitted to CBP only if the particular information pertains to the inbound cargo):

(i) The master air waybill number and the associated house air waybill number (M) (the house air waybill number may be up to 12 alphanumeric characters (each alphanumeric character that is indicated on the paper house air waybill document must be included in the electronic transmission; alpha characters may not be eliminated));

(ii) Foreign airport of origin (M) (The 3-alpha character ICAO code corresponding to the airport from which a shipment began its transportation by air to the United States (for example, if a shipment began its transportation from Hong Kong (HKG), and it transits through Narita, Japan (NRT), en route to the United States, the airport of origin is HKG, not NRT));

(iii) Cargo description (M) (a precise description of the cargo or the 6-digit Harmonized Tariff Schedule (HTS) number must be provided);

(iv) Total quantity based on the smallest external packing unit (M) (for example, 2 pallets containing 50 pieces each would be considered as 100, not 2);

(v) Total weight of cargo (M) (may be expressed in either pounds or kilograms);

(vi) Shipper name and address (M) (the name and address of the actual shipper (who is the owner and exporter) of the cargo from the foreign country);

(vii) Consignee name and address (M) (the name and address of the party to whom the cargo will be delivered in the United States, with the exception of "FROB" (Foreign Cargo Remaining On Board)); and

(viii) In-bond information (C) (this data element includes the destination airport; the international/domestic identifier (the in-bond type indicator); the in-bond control number, if there is one (C); and the onward carrier identifier, if applicable (C).

(3) *Letters and documents.* For purposes of advance electronic cargo information filing under this section, letters and documents being shipped to the United States are handled under the same procedures as all other types of cargo. Such shipments are subject to the same detailed data elements that are otherwise required for incoming air cargo under paragraphs (d)(1) and (d)(2) of this section. The term "letters and documents" as used in this paragraph means:

(i) The data (for example, records, diagrams, other business data) as described in General Note 19(c), Harmonized Tariff Schedule of the United States (HTSUS);

(ii) Securities and similar evidence of value described in subheading 4907, HTSUS, other than monetary instruments covered under 31 U.S.C. 5301–5322; and

(iii) Personal correspondence, whether on paper, cards, photographs, tapes, or other media.

(e) *Effective date of this section.* (1) *General.* Subject to paragraph (e)(2) of this section, all affected air carriers, and other parties as specified in paragraph (c)(1) of this section that elect to participate in advance automated cargo information filing, must comply with the requirements of this section on and after 90 days from the date that this section is published as a final rule in the **Federal Register**.

(2) *Delay in effective date of section.* The CBP may delay the general effective date of this section in the event that any necessary modifications to the approved electronic data interchange system are not yet in place. Also, CBP may delay the general effective date of this section at a given port until CBP has afforded any necessary training to CBP personnel at that port. In addition, CBP may delay implementation if further time is required to complete certification testing of new participants. Any such delay would be the subject of an announcement in the **Federal Register**.

8. Amend subpart G of part 122 by adding a new § 122.66 to read as follows:

§ 122.66 Clearance or permission to depart denied.

If advance electronic air cargo information is not received as pro-

vided in § 192.14 of this chapter, Customs and Border Protection may deny clearance or permission for the aircraft to depart from the United States.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority citation for part 123 would be revised, and the relevant specific sectional authority citation would continue, to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States (HTSUS)), 1431, 1433, 1436, 1448, 1624, 2071 note.

* * * * * * *

Section 123.8 also issued under 19 U.S.C. 1450–1454, 1459;

* * * * * * *

2. Amend § 123.8 by:

a. Adding a sentence after the second sentence in paragraph (a); and

b. Adding a sentence at the end of paragraph (d).

The additions would read as follows:

§ 123.8 Permit or special license to unlade or lade a vessel or vehicle.

(a) *Permission to unlade or lade.* * * * Permission to unlade or lade a truck may be denied for any cargo with respect to which advance electronic information has not been received as provided in § 123.92 or 192.14 of this chapter, as applicable.* * *

* * * * * * *

(d) *Term permit or special license.* * * * A term permit or special license to unlade or lade a truck already issued will not be applicable as to any cargo with respect to which advance electronic information has not been received as provided in § 123.92 or 192.14 of this chapter, as applicable.

3. Amend part 123 by adding a new subpart J to read as follows:

SUBPART J—ADVANCE INFORMATION FOR CARGO ARRIVING BY RAIL OR TRUCK

§ 123.91 Electronic information for rail cargo required in advance of arrival.

§ 123.92 Electronic information for truck cargo required in advance of arrival.

SUBPART J—ADVANCE INFORMATION FOR CARGO ARRIVING BY RAIL OR TRUCK

§ 123.91 Electronic information for rail cargo required in advance of arrival.

(a) *General requirement.* Pursuant to section 343(a), Trade Act of 2002, as amended (19 U.S.C. 2071 note), and subject to paragraph (e) of this section, for any train requiring a train sheet under § 123.6, that will have commercial cargo aboard, Customs and Border Protection (CBP) must electronically receive from the rail carrier certain information concerning the incoming cargo, as enumerated in paragraph (d) of this section, no later than 2 hours prior to the arrival of the cargo at the United States port of entry. Specifically, to effect the advance electronic transmission of the required rail cargo information to CBP, the rail carrier must use a CBP-approved electronic data interchange system.

(1) *Through cargo in transit to a foreign country.* Cargo arriving by train for transportation in transit across the United States from one foreign country to another; and cargo arriving by train for transportation through the United States from point to point in the same foreign country are subject to the advance electronic information filing requirement for incoming cargo under paragraph (a) of this section.

(2) *Cargo under bond.* Cargo that is to be unladed from the arriving train and entered, in bond, for exportation, or for transportation and exportation, in another vehicle or conveyance is also subject to the advance electronic information filing requirement under paragraph (a) of this section.

(b) *Exception; cargo in transit from point to point in the United States.* Domestic cargo transported by train to one port from another in the United States by way of a foreign country is not subject to the advance electronic information filing requirement for incoming cargo under paragraph (a) of this section.

(c) *Incoming rail carrier.* (1) *Receipt of data; acceptance of cargo.* As a prerequisite to accepting the cargo, the carrier must receive, from the foreign shipper and owner of the cargo or from a freight forwarder, as applicable, any necessary cargo shipment information, as listed in paragraph (d) of this section, for electronic transmission to CBP.

(2) *Accuracy of information received by rail carrier.* Where the rail carrier electronically presenting the cargo information required in paragraph (d) of this section receives any of this information from another party, CBP will take into consideration how, in accordance with ordinary commercial practices, the rail carrier acquired such information, and whether and how the carrier is able to verify this information. Where the rail carrier is not reasonably able to verify

such information, CBP will permit the carrier to electronically present the information on the basis of what the carrier reasonably believes to be true.

(d) *Cargo information required.* The rail carrier must electronically transmit to CBP the following information for all required incoming cargo that will arrive in the United States by train:

(1) The rail carrier identification SCAC code (the unique Standard Carrier Alpha Code assigned for each carrier by the National Motor Freight Traffic Association; see § 4.7a(c)(2)(iii) of this chapter);

(2) The carrier-assigned conveyance name, equipment number and trip number;

(3) The scheduled date and time of arrival of the train at the first port of entry in the United States;

(4) The numbers and quantities of the cargo laden aboard the train as contained in the carrier's bill of lading, either master or house, as applicable (this means the quantity of the lowest external packaging unit; containers and pallets do not constitute acceptable information; for example, a container holding 10 pallets with 200 cartons should be described as 200 cartons);

(5) A precise cargo description (or the Harmonized Tariff Schedule (HTS) number(s) to the 6-digit level under which the cargo is classified if that information is received from the shipper) and weight of the cargo; or, for a sealed container, the shipper's declared description and weight of the cargo (generic descriptions, specifically those such as "FAK" ("freight of all kinds"), "general cargo," and "STC" ("said to contain") are not acceptable);

(6) The shipper's complete name and address, or identification number, from the bill(s) of lading (this means the actual owner (exporter) of the cargo from the foreign country; listing a freight forwarder or broker under this category is not acceptable; the identification number will be a unique number to be assigned by CBP upon the implementation of the Automated Commercial Environment);

(7) The complete name and address of the consignee, or identification number, from the bill(s) of lading (The consignee is the party to whom the cargo will be delivered in the United States. However, in the case of cargo shipped "to order of [a named party]," the carrier must identify this named "to order" party as the consignee; and, if there is any other commercial party listed in the bill of lading for delivery or contact purposes, the carrier must also report this other commercial party's identity and contact information (address/phone number) in the "Notify Party" field of the advance electronic data transmission to CBP, to the extent that the CBP-approved electronic data interchange system is capable of receiving this data. The identification number will be a unique number assigned by CBP upon implementation of the Automated Commercial Environment);

(8) The place where the rail carrier takes possession of the cargo shipment;

(9) Internationally recognized hazardous material code when such materials are being shipped by rail;

(10) Container numbers (for containerized shipments) or the rail car numbers; and

(11) The seal numbers for all seals affixed to containers and/or rail cars to the extent that CBP's data system can accept this information (for example, if a container has more than two seals, and only two seal numbers can be accepted through the system per container, the carrier's electronic presentation of two of these seal numbers for the container would be considered as constituting full compliance with this data element).

(e) *Effective date for compliance with this section.* Rail carriers must commence the advance electronic transmission to CBP of the required cargo information, 90 days from the date that CBP publishes notice in the **Federal Register** informing affected carriers that the approved electronic data interchange system is in place and operational at the port of entry where the train will first arrive in the United States.

§ 123.92 Electronic information for truck cargo required in advance of arrival.

(a) *General requirement.* Pursuant to section 343(a) of the Trade Act of 2002, as amended (19 U.S.C. 2071 note), and subject to paragraph (e) of this section, for any truck required to report its arrival under § 123.1(b), that will have commercial cargo aboard, Customs and Border Protection (CBP) must electronically receive from the party described in paragraph (c) of this section certain information concerning the cargo, as enumerated in paragraph (d) of this section. The CBP must receive such cargo information by means of a CBP-approved electronic data interchange system no later than either 30 minutes or 1 hour prior to the carrier's arrival at a United States port of entry, or such lesser time as authorized, based upon the CBP-approved system employed to present the information.

(1) *Through cargo in transit to a foreign country.* Cargo arriving by truck in transit through the United States from one foreign country to another (§ 123.31(a)); and cargo arriving by truck for transportation through the United States from one point to another in the same foreign country (§ 123.31(b); § 123.42) are subject to the advance electronic information filing requirement in paragraph (a) of this section.

(2) *Cargo entered under bond.* Cargo that is to be unladed from the arriving truck and entered, in bond, for exportation, or for transportation and exportation, in another vehicle or conveyance are also subject to the advance electronic information filing requirement in paragraph (a) of this section.

(b) *Exceptions from advance reporting requirements.*

(1) *Cargo in transit from point to point in the United States.* Domestic cargo transported by truck and arriving at one port from another in the United States after transiting a foreign country (§ 123.21; § 123.41) is exempt from the advance electronic filing requirement for incoming cargo under paragraph (a) of this section.

(2) *Certain informal entries.* The following merchandise is exempt from the advance cargo information reporting requirements under paragraph (a) of this section, to the extent that such merchandise qualifies for informal entry pursuant to part 143, subpart C, of this chapter:

(i) Merchandise which may be informally entered on Customs Form (CF) 368 or 368A (cash collection or receipt);

(ii) Merchandise unconditionally or conditionally free, not exceeding $2,000 in value, eligible for entry on CF 7523; and

(iii) Products of the United States being returned, for which entry is prescribed on CF 3311.

(c) *Carrier; and importer or broker.* (1) *Single party presentation.* Except as provided in paragraph (c)(2) of this section, the incoming truck carrier must present all required information to CBP in the time and manner prescribed in paragraph (a) of this section.

(2) *Dual party presentation.* The United States importer, or its Customs broker, may elect to present to CBP a portion of the required information that it possesses in relation to the cargo. Where the broker, or the importer (see § 113.62(j)(2) of this chapter), elects to submit such data, the carrier is responsible for presenting to CBP the remainder of the information specified in paragraph (d) of this section.

(3) *Party receiving information believed to be accurate.* Where the party electronically presenting the cargo information required in paragraph (d) of this section receives any of this information from another party, CBP will take into consideration how, in accordance with ordinary commercial practices, the presenting party acquired such information, and whether and how the presenting party is able to verify this information. Where the presenting party is not reasonably able to verify such information, CBP will permit the party to electronically present the information on the basis of what the party reasonably believes to be true.

(d) *Cargo information required.* The following commodity and transportation information, as applicable, must be electronically transmitted to and received by CBP for all required incoming cargo arriving in the United States by truck, to the extent that the particular CBP-approved electronic data interchange system employed can accept this information:

(1) Conveyance number, and (if applicable) equipment number (the number of the conveyance is its Vehicle Identification Number (VIN) or its license plate number and state of issuance; the equip-

ment number, if applicable, refers to the identification number of any trailing equipment or container attached to the power unit);

(2) Carrier identification (this is the truck carrier identification SCAC code (the unique Standard Carrier Alpha Code) assigned for each carrier by the National Motor Freight Traffic Association; see § 4.7a(c)(2)(iii) of this chapter);

(3) Trip number and, if applicable, the transportation reference number for each shipment (the transportation reference number is the freight bill number, or Pro Number, if such a number has been generated by the carrier);

(4) Container number(s) (for any containerized shipment) (if different from the equipment number), and the seal numbers for all seals affixed to the equipment or container(s);

(5) The foreign location where the truck carrier takes possession of the cargo destined for the United States;

(6) The scheduled date and time of arrival of the truck at the first port of entry in the United States;

(7) The numbers and quantities for the cargo laden aboard the truck as contained in the bill(s) of lading (this means the quantity of the lowest external packaging unit; containers and pallets do not constitute acceptable information; for example, a container holding 10 pallets with 200 cartons should be described as 200 cartons);

(8) The weight of the cargo, or, for a sealed container, the shipper's declared weight of the cargo;

(9) A precise description of the cargo or the Harmonized Tariff Schedule (HTS) numbers to the 6-digit level under which the cargo will be classified (generic descriptions, specifically those such as FAK ("freight of all kinds"), "general cargo," and "STC" ("said to contain") are not acceptable);

(10) Internationally recognized hazardous material code when such cargo is being shipped by truck;

(11) The shipper's complete name and address, or identification number, from the bill(s) of lading (the identity of the actual shipper (the owner and exporter) of the cargo from the foreign country is required; the identification number will be a unique number to be assigned by CBP upon the implementation of the Automated Commercial Environment); and

(12) The complete name and address of the consignee, or identification number, from the bill(s) of lading (the consignee is the party to whom the cargo will be delivered in the United States, with the exception of "FROB" (Foreign Cargo Remaining On Board); the identification number will be a unique number assigned by CBP upon implementation of the Automated Commercial Environment).

(e) *Effective date for compliance with this section.* The incoming truck carrier and, if electing to do so, the United States importer, or its Customs broker, must present the necessary cargo data to CBP at the particular port of entry where the truck will arrive in the United

States on and after 90 days from the date that CBP has published a notice in the **Federal Register** informing affected carriers that:

(1) The approved data interchange is in place and fully operational at that port; and

(2) The carrier must commence the presentation of the required cargo information through the approved system.

PART 192—EXPORT CONTROL

1. The authority citation for part 192 would be revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1624, 1646c. Subpart A also issued under 19 U.S.C. 1627a, 1646a, 1646b; subpart B also issued under 13 U.S.C. 303; 19 U.S.C. 2071 note; 46 U.S.C. 91.

2. Amend subpart B of part 192 by adding a new § 192.14 to read as follows:

§ 192.14 Electronic information for outward cargo required in advance of departure.

(a) *General requirement.* Pursuant to section 343(a), Trade Act of 2002, as amended (19 U.S.C. 2071 note), and subject to paragraph (e) of this section, for any commercial cargo that is to be transported out of the United States by vessel, aircraft, rail, or truck, unless exempted under paragraph (d) of this section, the United States Principal Party in Interest (USPPI), or its authorized agent, must electronically transmit for receipt by Customs and Border Protection (CBP), no later than the time period specified in paragraph (b) of this section, certain cargo information, as enumerated in paragraph (c) of this section. Specifically, to effect the advance electronic transmission of the required cargo information to CBP, the USPPI or its authorized agent must use a CBP-approved electronic data interchange system (currently, the Automated Export System (AES)).

(b) *Presentation of data.* (1) *Time for presenting data.* USPPIs or their authorized agents must electronically transmit and verify system acceptance of required cargo information for outbound cargo no later than the time period specified as follows (see paragraph (b)(3) of this section):

(i) For vessel cargo, the USPPI or its authorized agent must transmit and verify system acceptance of export vessel cargo information no later than 24 hours prior to the departure of the vessel;

(ii) For air cargo, including cargo being transported by Air Express Couriers, the USPPI or its authorized agent must transmit and verify system acceptance of export air cargo information no later than 2 hours prior to the scheduled departure time of the aircraft;

(iii) For truck cargo, including cargo departing by Express Consignment Courier, the USPPI or its authorized agent must transmit and verify system acceptance of export truck cargo information

no later than 1 hour prior to the arrival of the truck at the border; and

(iv) For rail cargo, the USPPI or its authorized agent must transmit and verify system acceptance of export rail cargo information no later than 4 hours prior to the time at which the engine is attached to the train to go foreign.

(2) *Applicability of time frames.* The time periods in paragraph (b)(1) of this section for reporting required export cargo information to CBP for outward vessel, air, truck, or rail cargo only apply to shipments without an export license, that require full pre-departure reporting of shipment data, in order to comply with the advance cargo information filing requirements under section 343(a), as amended. Paragraph (e) of this section details effective dates for compliance with the time frames provided in paragraph (b)(1) of this section. Requirements placed on exports controlled by other Government agencies will remain in force unless changed by the agency having the regulatory authority to do so. The CBP will also continue to require 72-hour advance notice for vehicle exports pursuant to § 192.2(c)(1) and (c)(2)(i) of this part. USPPIs or their authorized agents should refer to the relevant titles of the Code of Federal Regulations for prefiling requirements of other Government agencies.

(3) *System verification of data acceptance.* Once the USPPI or its authorized agent has transmitted the data required under paragraphs (c)(1) and (c)(2) of this section, and the CBP-approved electronic system has received and accepted this data, the system will generate and transmit to the USPPI a confirmation number (this number is known as the Internal Transaction Number (ITN)), which verifies that the data has been accepted as transmitted for the outgoing shipment.

(c) *Information required.* (1) *Currently collected commodity data.* The export cargo information to be collected from USPPIs or their authorized agents for outbound cargo is already contained in the Bureau of Census electronic Shipper's Export Declaration (SED) that the USPPI or its authorized agent currently presents to CBP through the approved electronic system. The AES Commodity Module already captures the requisite export data, so no new data elements for export cargo are required under this section. The export cargo data elements that are required to be reported electronically through the approved system are also found in § 30.63 of the Bureau of Census Regulations (15 CFR 30.63).

(2) *Transportation data.* Reporting of the following transportation information is currently mandatory for the vessel, air, truck, and rail modes (see also paragraph (c)(3) of this section):

(i) Mode of transportation (the mode of transportation is defined as that by which the goods are exported or shipped (vessel, air, rail, or truck));

(ii) Carrier identification (for vessel, rail and truck shipments, the unique carrier identifier is the 4-character Standard Carrier Alpha Code (SCAC); for aircraft, the carrier identifier is the 2- or 3-character International Air Transport Association (IATA) code);

(iii) Conveyance name (the conveyance name is the name of the carrier; for sea carriers, this is the name of the vessel; for others, the carrier name);

(iv) Country of ultimate destination (this is the country as known to the USPPI at the time of exportation, where the cargo is to be consumed or further processed or manufactured; this country would be identified by the 2-character International Standards Organization (ISO) code for the country of ultimate destination);

(v) Estimated date of exportation (the USPPI or its authorized agent must report the date the cargo is scheduled to leave the United States for all modes of transportation; if the actual date is not known, the USPPI or its authorized agent must report the best estimate as to the time of departure); and

(vi) Port of exportation (the port where the outbound cargo actually departs from the United States is designated by its unique code, as set forth in Annex C, Harmonized Tariff Schedule of the United States (HTSUS)).

(3) *Proof of electronic filing; exemption from filing.* The USPPI, or its authorized agent, must furnish to the outbound carrier a proof of electronic filing citation (the ITN), low-risk exporter citation (currently, the Option 4 filing citation), or exemption statement, for annotation on the carrier's outward manifest, waybill, or other export documentation covering the cargo to be shipped. The proof of electronic filing citation, low-risk exporter citation, or exemption statement, will conform to the approved data formats found in the Bureau of Census Foreign Trade Statistics Regulations (FTSR) (15 CFR part 30).

(4) *Carrier responsibility.* (i) *Loading of cargo.* The carrier may not load cargo without first receiving from the USPPI or its authorized agent either the related electronic filing citation as prescribed under paragraph (c)(3) of this section, or an appropriate exemption statement for the cargo as specified in paragraph (d) of this section.

(ii) *High-risk cargo.* For cargo that CBP has identified as potentially high-risk, the carrier, after being duly notified by CBP, will be responsible for delivering the cargo for inspection/examination. If the cargo identified as high risk has already departed, CBP will exercise its authority to demand that the export carrier redeliver the cargo in accordance with the terms of its international carrier bond (see § 113.64(g)(2) of this chapter).

(5) *USPPI receipt of information believed to be accurate.* Where the USPPI or its authorized agent electronically presenting the cargo information required in paragraphs (c)(1) and (c)(2) of this section receives any of this information from another party, CBP will

take into consideration how, in accordance with ordinary commercial practices, the USPPI or its authorized agent acquired this information, and whether and how the USPPI or authorized agent is able to verify this information. Where the USPPI or authorized agent is not reasonably able to verify any information received, CBP will permit this party to electronically present the information on the basis of what it reasonably believes to be true.

(d) *Exemptions from reporting; Census exemptions applicable.* The USPPI or authorized agent must furnish to the outbound carrier an appropriate exemption statement (low-risk exporter or other exemption) for any export shipment laden that is not subject to predeparture electronic information filing under this section. The exemption statement will conform to the proper format approved by the Bureau of Census. Any exemptions from reporting requirements for export cargo are enumerated in §§ 30.50 through 30.58 of the Bureau of Census Regulations (15 CFR 30.50 through 30.58). These exemptions are equally applicable under this section.

(e) *Effective date for compliance.* The requirements of this section, including the pre-departure time frames for reporting export cargo information for required shipments, and the requirement of the ITN, will be implemented concurrent with the completion of the redesign of the AES commodity module and the effective date of mandatory filing regulations that will be issued by the Department of Commerce pursuant to the Security Assistance Act (Public Law 107–228). This date will be announced in the **Federal Register**.

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

Approved: July 17, 2003

TOM RIDGE
Secretary,
Department of Homeland Security.

The following appendix will not appear in the Code of Federal Regulations:

APPENDIX

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

The Bureau of Customs and Border Protection (CBP) conducted the analysis below to concurrently address the requirements of the Regulatory Flexibility Act (RFA) of 1980 and Executive Order 12866. Those provisions require, respectively, that CBP (1) assess the impact of proposed rules on small business entities via an initial regulatory flexibility analysis and (2) determine if the proposed rule is a significant regulatory action, defined as having annual impact on

the United States economy of $100 million or more. Critical to recognize is the RFA's focus of the proposed rule's effect on small, United States-based entities, as established by the standards identified in Panel 1 below.

Panel 1—Industry Size Standards For Small Entities[1]

Mode	*Industry Grouping*	NAICS Sector Identifier	Standard of Measure—Less Than:
Air	Scheduled and Non-Scheduled Freight	#48112 #481212	1500 employees
Rail	Short Haul	#482112	500 employees
Vessel	Deep Sea	#483111	500 employees
Truck	(a) General Freight, Local (b) General Freight, Long Distance (b) General Freight, Long Distance & Less Than Truckload (c) Specialized Freight, Local (e) Specialized Freight, Long Distance	#484110 #484121 #484122 #484220 #484230	$21.5 million gross annual revenues

([1]Source: Small Business Size Standards Matched to North American Industry Classification Systems (NAICS), Small Business Administration, October 1, 2002)

A. Need For and Objective of the Proposed Rule

The proposed rule responds to the requirements of Section 343(a) of the Trade Act of 2002, as amended (19 U.S.C. 2071 note). That Act requires that CBP implement procedures which require the advanced electronic submission of cargo information for both imports into and exports from the United States while not unduly impeding the flow of lawful trade. The fundamental objective of the proposed rule centers on providing CBP with sufficient detailed information on trade flows within a sufficient advanced timeframe such that CBP may exercise review, targeting and inspection of those shipments with the purpose of identifying and subsequently inspecting those high risk shipments with potential application to terrorist activities.

B. Description and Estimates of Small Entities Affected By The Proposed Rule

The proposed rule centers on two key features: (a) electronic submission of cargo information and (b) that information's submission prior to arrival into/departure from the United States. The advanced submission requirements vary by mode of transport, reflecting operational requirements and conditions for those modes. The advanced submission timeframes by mode are summarized in Panel 2 below:

Panel 2—Summary of Electronic Submission Timeframes by Mode

Mode	Inbound	Inbound Baseline Time-frame for Advanced Electronic Submission	Outbound	Outbound Baseline Time-frame for Advanced Electronic Submission
Vessel	All cargo requiring reporting for CBP purposes	24 hours prior to lading at foreign port of departure	All cargo requiring reporting under current Census regulations1	24 hours prior to departure

Mode	Inbound	Inbound Baseline Time-frame for Advanced Electronic Submission	Outbound	Outbound Baseline Time-frame for Advanced Electronic Submission
Air	All cargo requiring reporting for CBP purposes	4 hours prior to arrival in US[2]	All cargo requiring reporting under current Census regulations[1]	2 hours prior to scheduled departure
Rail	All cargo requiring reporting for CBP purposes	2 hours prior to arrival at 1st US port	All cargo requiring reporting under current Census regulations[1]	4 hours prior to attachment of engine to train to go foreign
Truck	All cargo requiring reporting for CBP purposes	30 minutes or 1 hour prior to arrival at 1st US port	All cargo requiring reporting under current Census regulations[1]	1 hour prior to scheduled border crossing

([1]NOTE: As a matter of clarification and definition of the proposal's coverage, United States exports to Canada are not subject to advanced electronic cargo information submission under this proposal unless (a) the merchandise is licensable by Department of State or Department of Defense regulations or (b) the merchandise is transiting Canada with a 3rd country destination.)

([2] NOTE: However, in the case of cargo requiring reporting for CBP purposes that departs for the United States from any foreign port or place in North America (including locations in Mexico), Central America, South America (from north of the Equator only), the Caribbean, and Bermuda, the cargo information must be received no later than the time of the departure of the aircraft for the United States (no later than the time that wheels are up on the aircraft, and it is en route directly to the United States.)

The General Theory

In classical economic theory, the value and volume of the supply and demand for goods and services in a national economy exist under conditions of an equilibrium price for those goods and services, both domestically, through national income accounting components, and internationally, through the net trade component. Disruptions, or changes, in that state of equilibrium occur regularly and frequently, with concomitant changes in supply and demand. Sources of such changes can be of a cyclical, secular or random noise variety, ranging in gravity and comprehensiveness in effect from major, as in large sustained increases in international energy prices, to small, as in damage to a large retailer's distribution center, to negligible, as in the brief closure for periodic maintenance of a single manufacturing plant. Each such significant change results in the economic model's initial equilibrium adjusting and readjusting via the mechanism of elasticities of price with respect to demand until all multiplier effects are exhausted and a new state of equilibrium is achieved, both nationally and internationally via competing goods and services. The significance of change to a new equilibrium will depend on the gravity of that initial change.

The Specific Regulatory Case

In the case of the current considered proposed rule on advanced electronic submission of cargo information, such a proposed rule represents, to one degree or another, a change in the national and international economic system's equilibrium. To the extent that the rule requires substantive process adjustments by producers, carriers, brokers, importers and exporters, then the proposed rule would represent an effective change in system equilibrium, resulting in subsequent substantial changes in supply, demand and price. To the extent that the rule's effect on trade participants is slight to negligible, then the rule's effect would not measurably alter system equilibrium.

In the sections below, CBP will identify, isolate, explore, explain and estimate the extent of the proposed rule's impact on the national United States economy pursuant to E.O. 12866 and net trade component by means of identifying the process adjustments expected for small business entities under the RFA. The CBP intends to supplement this initial regulatory impact analysis under E.O. 12866, and this initial regulatory flexibility analysis under the RFA with an expanded, more comprehensive follow-up assessment conducted by a private source under contract. The summary of operational change, presented in Panel 2 above, serves as a map to the estimation of the rule's impact.

Commonalities of Proposed Rule

The proposed rule offers certain conditions in common for all trade participants regardless of mode:

(1) Advanced information submission, albeit with different timeframes for different modes;

(2) Mandatory electronic filing;

(3) Costs to be incurred for compliance include those which are recurring and those which are one-time only;

(4) Mandatory use of already existing government approved electronic data interchange systems, notably the Automated Export System (AES) for all export transactions; Automated Manifest System (AMS) with applications for inbound rail, air, and vessel shipments; and other modules, such as the NCAP (National Customs Automation Program) prototype, with special application for truck modal operations;

(5) Internet access to CBP data interchanges for information submission and message transaction;

(6) Submitter's choice to exercise preference to employ third parties for information submission; and

(7) "Just-in-time" manufacturing considerations, common in CBP's prior "Strawman" proposals, are eliminated as a result of substantive reductions in timeframes for prior data submission.

Air Mode Inbound

The proposed rule establishes timeframes of 4 hours for electronic submission of information prior to the aircraft's arrival in the United States, or no later than the time of "wheels-up" in the case of certain nearby foreign areas. Panel 3 below summarizes the volume of inbound air cargo by principal air carrier segment.

Panel 3—Inbound Air Cargo Activity, January 2003

Air Carrier Segment	Airway Bill Volume (in thousands)	Median Number of US Ports Served
Total Volume (355 Active Air Carriers)	3,270	—
(A) Volume of Express Consignment Carriers		
Major carriers	2,410 (73.7%)	14
(B) Other Air Cargo	860 (26.3%)	—
Top 14 Carriers	460 (14.1%)	9
Remaining 338 Carriers	400 (12.3%)	3

Source: Automated Commercial System

In addition to requiring information submission four hours prior to arrival in the United States, or no later than the time of "wheels-up" in the case of certain nearby foreign areas, air carriers will be required to provide their own interface capability with the government approved electronic interchange at each U.S. Port of Arrival served by that carrier. The current government approved interchange is the Automated Manifest System—Air (AAMS). Those carriers will no longer be required to present a hard copy of their manifest upon arrival. Only in the event that the data interchange system is temporarily unavailable by malfunction would carriers be required to present a hard copy of their cargo manifest.

The data in Panel 3 establishes several relevant considerations in assessing the proposed rule's impact. The large majority of air inbound shipments (73.7%), as measured by airway bills, is accounted for by a relatively small number of large express consignment carriers. Those carriers currently are highly automated and currently have the capacity at virtually no cost to comply with the data submission provisions of the proposed rule. Measured by median, those carriers import shipments into 13 U.S. ports of arrival and long ago equipped those sites for AAMS transmissions.

These express consignment carriers would likely not be affected by the proposed rule even in the case of short haul flights, largely originating in Mexico and Canada, inasmuch as they would only be required to submit AAMS information no later than the time of departure from the foreign area (no later than the time of "wheels-up"). As a result, there would be no delay in departure from the foreign source necessitated in order to meet a pre-arrival reporting requirement. In any event, in operational practice, those carriers often engage more economical land shipment instead of higher cost air movement for short haul moves.

As a result of the above data and operational considerations, CBP concludes that these large carriers are substantially unaffected by the proposed rule.

The CBP estimates that these same factors and conclusion above hold for the second tier of air carriers, comprising 14.1% of airway bill volume. Those 14 carriers arrive at a median 9 U.S. Ports of Arrival.

The CBP data establish that a remaining 338 small carriers account for 12.3% of inbound air volume, serving a median 3 Ports of Arrival. Operating on a manual hard copy basis upon arrival, a majority of those 338 entities are foreign owned and fall out of the scope of the RFA. For those U.S. based small air carriers, CBP estimates that one time costs would be incurred to establish data transmission capability at the median three arrival ports. To a significant degree, those one time costs would be mitigated by recurring operational efficiencies related to standard business operations and more rapid CBP processing and release of shipments, allowing more rapid turn-

around of the aircraft and crew for increased revenue generation activities.

International inbound mail shipments are included in the cargo volumes cited above. However, advanced data submission for mail shipments through the United States Postal Service (USPS) is excluded from consideration in the proposed rule. To this end, reflecting the restrictive condition of involvement of sovereign foreign governments and pre-existing international treaties governing the movement of international inbound mail shipments, CBP contemplates that such shipments will not at this time be subject to the terms and conditions of the proposed rule.

Truck Mode Inbound; Rail Mode Inbound

Panel 4 below illustrates the volume of truck and rail traffic reported on the Northern and Southern borders:

Panel 4—Conveyance Arrivals

Mode	FY 2002 Volume (in thousands)
Total Commercial Aircraft	574.3
Total Trucks	12,258.0
At Southern Border	349.8 (2.9%)
At Northern Border	11,908.2 (97.2%)
Total Trains	44.3
At Southern Border	8.4 (19%)
At Northern Border	35.9 (81%)
Total Vessels	226.2

Source: Automated Commercial System

Truck Mode Inbound; Explanation and Analysis of Data

The proposed rule requires cargo information submission either 30 minutes or 1 hour prior to arrival at the first U.S. Port of Arrival. As noted in Panel 4 above, the large majority of truck arrivals (97.2%) occurs at Northern Border ports. The CBP estimates that 60% of this inbound mode arrives with manually presented hard copy cargo information and, therefore, would be subject to changed operations to comply with the proposed rule. Further, consultations with industry sources suggest that the Northern Border supports an estimated 22,000 individual truck entities, of which 15,000 meet Small Business Administration standards as small entities (see Panel 1 above). A substantial portion of the 15,000 small trucking firms are Canada-

based and, therefore, beyond the scope of the RFA's consideration. The portion of this segment which is U.S. based will be required to incur one time costs for hardware and software for data transmission.

While hardware requirements and software cost relatively little and while internet transmission is distinctly low cost, those firms will be required to expend time for data entry. Compared to normal, pre-proposal operation standards, that factor could represent a significant cost.

On the other hand, CBP estimates that recurring annual costs of data transmission are low. Further, certain other benefits representing lower operating costs will be realized. Electronic transmission will represent a lower cost burden on record keeping for those entities as well as speed cargo information submission and physical border release of the conveyance at the U.S. port of arrival for those shipments. Such electronic efficiencies could be expected to translate directly into lower daily operational costs for entities. Also, the likelihood is substantial that U.S. based small truck entities will develop cooperative and commercial arrangements with exporters. Such arrangements would likely involve provision to the truck entity of data in readily transmittable format, thus reducing the data entry burden of this segment.

As yet another mitigating factor, small truck entities may choose to engage the data services of port authorities or commercial service providers. Further still, there is a social good to be considered in that faster conveyance release at the port of arrival will translate directly into less local traffic congestion at the port and lower diesel emissions for residents of the locality. While complex to quantify, such commercial and health benefits cannot responsibly be neglected because tangible social welfare and commercial benefits will result.

Less than 3% of truck activity takes place at Southern Border sites (see Panel 4 above). An unestablished number of trucking entities operate in that geographic environment. However, long-term operational observation establishes that much of that border's truck volume centers on servicing the maquiladora industry based in the local Mexican border area. These Mexican-based plants are owned and operated in the large majority for the assembly function by large U.S. and multinational corporations (Chapter 98, Subchapter II, Harmonized Tariff Schedule of the United States (HTSUS) (Articles Exported and Returned, Advanced or Improved Abroad)). Such U.S. and multinational corporations are highly automated in their record keeping and cargo information transmission capabilities.

Further, a substantial majority of that north bound traffic relies on lower cost Mexican-based trucking entities operating in a shuttle fashion to supply finished products to distribution facilities located on U.S. territory. Such foreign owned trucking entities are beyond the scope of the RFA's consideration.

If small U.S. based truck companies engage data transmitting aids at a commercially negotiated cost, one would reasonably expect that truck companies would pass those costs downstream. Such a cost increase may encourage a change in competitive relationships with comparable transportation services offered by rail carriers. Further consideration, however, mitigates the likelihood and significance of any competitive modal shift in that such shifts depend highly on the (1) nature of the merchandise to be transported, (2) elasticities of price with respect to demand for those commodities for trade participants and (3) the inherent established time and location-of-service flexibility of trucking versus rail transport.

In summary for this inbound mode, a certain substantial number of U.S. based small truck entities operating on the Northern Border may experience measurable cost of operation impact from the proposed rule. However, CBP estimates that many of those costs would be offset by concomitant operational efficiencies directly resulting from an operational shift from pre-proposal manual hard copy practices to electronic filing and expedited border release, freeing up resources for expanded revenue generation opportunities.

Rail Mode Inbound; Explanation and Analysis of Data

The proposed rule establishes that cargo information will be electronically submitted 2 hours prior to arrival at the first U.S. port of arrival. As noted in Panel 4 above, 81% of rail volume occurs at Northern Border ports. The CBP estimates that all but 6 rail carriers already submit cargo information electronically. Only those 6 carriers would be affected by the proposed rule, and of those 6, some may not qualify as a small entity according to Panel 1 SBA standards. The operational effect of the proposal would be mitigated to a substantial degree by operational efficiencies attributable to electronic filing. Further mitigation is identified by the proposal's provision that the filing requirement will become mandatory within 90 days of CBP port automation to allow Rail AMS. The CBP establishes that 12 border ports still remain to be made operational for Rail AMS operation.

Vessel Mode Inbound

The proposed rule establishes that cargo information will be transmitted to CBP 24 hours prior to lading at the foreign port of departure, a standard which is consistent and exactly compatible with the earlier implemented Container Security Initiative (CSI). An estimated 50% of inbound vessel volume is accounted for by the previously implemented CSI program. The CBP estimates that a further 45% of inbound vessel cargo volume already participates in AMS electronic transmission, leaving only 5% of this vessel volume to be affected by the proposed rule. Also, because of the transportation timeframes inherent in long haul vessel transport, the filing time re-

quirement is not expected to impose a measurable operational burden on carriers. And based on capital and labor requirements and practices in this segment, it is highly unlikely that these carriers would meet SBA small entity standards (see Panel 1 above). Further still, few carriers are U.S. based and thus properly considered under provisions of the RFA.

All Modes Outbound

Panel 5, below, illustrates the increasing volume of export shipments, from 1995 through 2002, that have been reported electronically through the Automated Export System (AES); and Panel 6, below, reflects, as of February 2003, the vastly increased number of export shipments being reported through AES as a percentage of the total number of export shipments reported, both electronically and on paper.

Panel 5—Volume of AES Shipments
(External Transaction Numbers, in thousands)

Year	Total	Air	Rail/Truck	Vessel
1995	0.4	0	0	0.4
1996	21.4	0	0	21.4
1997	60.7	0.2	3.6	56.9
1998	221.0	30.3	81.1	109.6
1999	1038.5	486.4	262.7	289.5
2000	7140.9	4053.3	1407.0	1676.2
2001	8819.0	4424.3	1586.3	2800.7
2002	9424.0	4788.8	1832.9	2785.0

Source: Bureau of the Census

Panel 6—Export Records, February 2003
(in thousands)

Mode	Via AES	Via Paper SED	Total Records	AES as % of Total
Air	421.3	80.7	502.1	83.9%
Vessel	286.3	11.7	298.0	96.1%
Truck/Rail	261.3	52.7	314.0	83.3%
Total	968.9	145.2	1114.1	87.0%

Source: Bureau of the Census

All Modes Outbound; Explanation and Analysis of Data

The participation of outbound shipments in the proposed rule's reporting requirements will be concurrent with the completion of the redesign of the AES commodity module and mandatory, effective with a future regulatory publication by the Department of Commerce. For purposes of this proposed rule, the treatment below of outbound regulatory flexibility and E.O. 12866 impact is presented for information purposes solely.

The proposed rule states that exporters (U.S. Principal Parties in Interest—USPPI's) or their authorized agents will file commodity export information via the existing government approved data interchange, AES, within certain time frames prior to departure from the U.S. (see Panel 2 for time frames).

The use of AES has risen dramatically since its inception in 1995 (see Panel 5), such that currently AES transactions account for 87% of all export records (see Panel 6). Because of the large majority already participating in AES filing, only 13% of export records will be affected by the proposed rule.

Because of modal travel and preparation times, CBP does not identify notable operational hardship in meeting border crossing filing times for any mode. In fact, the air express consignment burden is decreased compared to imports by a 1 hour timeframe prior to departure. Filings may take place via low cost internet transmission. In filing, the USPPI will submit electronically to CBP a self generated external transaction number (XTN), receiving from CBP an internal transaction number (ITN), which is a system verification and approval (confirmation) number for cargo shipment information. Actual performance establishes that the ITN turnaround is routinely less than 1 minute. Only in the case that the USPPI chooses to engage in a third party commercial data transmission agent would the ITN/XTN turnaround require greater time, an estimated 15–30 minutes.

As in the *Truck Mode Inbound* section above, a potential impact may be experienced by small truck entities serving Northern border export transactions. However, as detailed in the Note to Panel 2, United States exports to Canada are not subject to advanced electronic cargo information submission under this proposal unless (a) the merchandise is licensable by Department of State or Department of Defense regulations or (b) the merchandise is transiting Canada with a 3rd country destination. Such a reporting factor may reasonably be expected to mitigate any burden on small trucking entities in providing a significant portion of the remaining 13% of outbound AES data.

Further with respect to outbound small truck entities, as also noted in the *Truck Mode Inbound* section above, certain cost lowering operational efficiencies will flow from the proposal's obligation to employ electronic filing, namely: (a) Electronic transmission will rep-

resent a lower cost burden on record keeping for those entities; (b) more rapid cargo information submission; and (c) more rapid physical border release of the conveyance at the U.S. port of arrival for those shipments. Such electronic efficiencies could be expected to translate directly into lower daily operational costs for entities, either partially or entirely offsetting one-time data transmission costs.

EXECUTIVE ORDER 12866 AND SIGNIFICANT REGULATORY ACTION

Sector of Impact Identified

Outbound merchandise shipments generated by the United States Postal Service (USPS) may or may not be included within the scope of the proposed rule. In the event of inclusion, as a hybrid-type "publicly owned private corporation", the USPS would be responsible for data entry and transmission of an estimated 30 million outbound merchandise transactions (i.e., parcel shipments) per year. While not included in the framework of the small entity oriented RFA, this organization and the proposal's effects become relevant in E.O. 12866 considerations which relate to impacts on the national economy. The CBP estimates that USPS would incur costs of $4–$6 per outbound transaction in order to perform data entry or purchase data entry services for each export transaction, yielding a total impact of $120 million–$180 million annually. Reasonably expected is that the USPS would request and be permitted to pass that cost to exporters (U.S.-based consumers) through some mechanism of, effectively, a user fee.

In the case that outbound international mail shipments are indeed included in the proposed rule, then such an impact readily qualifies this proposal as a significant regulatory action, surpassing the $100 million economic impact threshold established by the Executive Order. In the case that such shipments are removed or waived from the proposal at a later time, then the proposed rule's categorization as a significant regulatory action would no longer hold.

Competitive Relationship Effect

In the event of the USPS being obliged to provide outbound shipment data, then CBP estimates that the proposed rule would increase the degree of commercial competition between USPS and express consignment carriers. The U.S. Customs Service (now merged into CBP) prepared a detailed report to Congress in late 1997 identifying a series of factors of preferential Customs treatment available to USPS and not available to express consignment carriers. One of those identified factors focused on the Customs requirement for express carriers to provide detailed export transaction data with no equivalent requirement for USPS export shipments. By requiring USPS to provide the same data elements as express carriers in the

same timeframe, the proposed rule would eliminate one key element of disparate treatment, effectively leveling the playing field between these two exporting entities and bringing both parties into more equal business operating practices.

C. Automation Costs of Participation in Advance Electronic Cargo Information Submission

CBP estimates below the following costs of shipper/carrier/importer/exporter compliance with electronic transmission requirements within the proposed rule's time frame for submission. The data were gathered from discussions with software providers and trade participants active in electronic data transmission with CBP.

AIR MODE

Air mode is estimated to incur the greater of the costs for all modes. In order to purchase software, a large air carrier would incur costs of $5,000–$25,000 as a one-time license fee and $6,000/year in maintenance costs, plus an estimated $20,000/yr. in operating costs, primarily labor. If the air carrier chose to develop the transmission software independently, the carrier would incur development costs of an estimated $100,000, plus annual operating costs of $400,000, primarily labor. If the air carrier were to seek transmission services from a service provider, the carrier would incur costs of $500–$2,000 in one time subscription fees, plus an annual minimum $6,000 cost.

In estimating air industry total costs of compliance with the proposed rule, CBP established that 260 of the total 355 air carriers are American-based. The CBP estimates that these 260 carriers will choose information transmission compliance options in the following distribution: (a) 5 to develop software, maintain system and transmit at their own initiative; (b) 50 to purchase software, maintain and transmit; and (c) 205 to employ service providers for software, maintenance and transmission. Employing that distribution, CBP estimates the following transmission costs of compliance, broken down by both one-time and recurring annual costs:

Estimated Air Mode Costs of Transmission
(Thousands of dollars)

Transmission Option Selected	One Time Costs	Recurring Annual Costs
I. Develop	$500	$2,000
II. Purchase	$750	$1,300
III. Service Providers	$205	$1,230
TOTAL	$1,455	$4,530

TRUCK MODE

In consideration of the truck mode, the primary cost for a shipper/carrier would involve complying with the Automated Broker Interface (ABI) Selectivity practices.

Specifically, there are approximately 13,400 trucking firms that will eventually have to move from a paper-based system to an electronic system.* Compliance with the Automated Broker Interface Selectivity practices would require, at a minimum, a facsimile transmission within the proposed rule's time frame for advance information.

Therefore, this rule would impose a small capital cost (a fax machine for firms that do not already own a fax machine), and a per-transmission cost. Firms could also avail themselves of a commercial transmission service; however, the per-transmission cost may be less cost-effective than a personal fax machine for a firm involved in many shipments. The per-transmission cost should be minimal, since the information that firms would need to send already must be gathered and presented at the time of arrival under current procedures. The CBP also assumes that most trucking firms will already own a fax machine. If 50% of firms must invest in a fax machine (a likely overestimate) at approximately $150 per machine, the total cost of this rule for the trucking industry would be a one-time cost of approximately $1 million. The CBP also makes a preliminary determination that this rulemaking would not result in any other changes in business practices that would impose additional costs to trucking firms. We request comments on these assumptions.

(*CBP estimates the following already in the analysis: (22,000 Truck firms at the Canada border + 350 Truck firms at Mexico border)*(.60 that are currently paper based) = 13,410).)

VESSEL AND RAIL MODES

Vessel and rail carriers are the least affected in terms of cost of transmission because of those carriers' already high participation rate in electronic transmission meeting the proposed rule's requirements. In practical terms, costs of data submission for these segments of the trade are adjudged near negligible.

D. Record Keeping and Reporting Requirements

The proposed rule does not include additional, new record keeping requirements. Instead, because of the reliance of the proposal on electronic transmissions, the proposal may well simplify and reduce existing record keeping obligations of the trade participants. In terms of reporting requirements, the proposal carefully relies on using existing government approved electronic data interchange tools already in widespread use by trade participants.

E. Alternatives Considered

The CBP considered and incorporated alternative methodologies into the proposed rule's data submission requirements on trade community participants. In developing the proposed rule, CBP sought to balance the operational needs of legitimate commercial cargo flows with a meaningful and effective timeframe for identifying, targeting and inspecting potentially high risk merchandise shipments. In order to identify that balance, CBP proposed requirements for advance electronic submission by mode in "Strawman" proposals. Those initial standards proposed submission timetables ranging from 24 hours prior to departure to 4–24 hours prior to lading and subsequent cargo movement.

Substantial public comment and public hearings followed the "Strawman" Proposals, offering multiple alternatives. With a high degree of uniformity and consistency, those alternatives focused on several common issues: (1) using already existing automated systems, such as AES and AMS for data submission; (2) different, more compact timeframes for provision of advanced information, oriented primarily around the objective of non-disruption of standard business transportation practices and commercially critical "just-in-time" delivery systems; and (3) re-focus of advanced data submission from a pre-lading basis to, respectively, a pre-arrival-into or pre-departure- from U.S. basis.

In response to public expressions and explanations, CBP, subsequent to the "Strawman" Proposals, effectively re-focused the time and transportation scheduling basis for the advanced electronic data submissions (see Panel 2 above vs. original Strawman framework) such that the proposed rule fairly closely reflects the philosophy and principles of the publicly expressed alternatives.

F. Conclusion

REGULATORY FLEXIBILITY ACT (RFA)

With respect to RFA considerations, CBP concludes that the proposed rule will result in no significant economic impact on a substantial number of small U.S. entities because:

(1) The proposed rule's reporting timeframes are reasonably compatible with modern shipping practices and capabilities and fundamentally reflect the alternative approaches presented by those commercial interests;

(2) The high volume of inbound and outbound transactions already currently reported on an electronic basis;

(3) Low cost of electronic transmission of the required data;

(4) Accessibility to and use of already existing government approved electronic data interchange mechanisms;

(5) Subsequent operating efficiencies resulting from electronic fil-

ing, resulting in enhanced revenue generating activities of small carriers;

(6) Exclusion of most exports to Canada from Bureau of the Census reporting;

(7) The RFA's exclusion from consideration of non-U.S. entities;

(8) Availability of existing Discrepancy Reporting authority for carriers to update/correct previously submitted cargo data; and

(9) Reporting timeframes which do not interfere with critical "just-in-time" delivery systems.

EXECUTIVE ORDER 12866

With respect to Executive Order 12866, CBP concludes that, should USPS export transactions be included within the scope of the proposal's reporting requirements, the proposal qualifies as a significant regulatory action, with annual national economic cost greater than $100 million because USPS costs incurred would likely be recouped as user fees charged to U.S. exporters. The reverse conclusion would hold in the event that USPS export transactions are not included within the proposed rule. Further, in the case that USPS exports are included, the USPS—express consignment commercial competitive relationship would be more equalized.

[Published in the Federal Register, July 23, 2003 (68 FR 43574)]

PROPOSED COLLECTION; COMMENT REQUEST

SUBMISSION FOR OMB EMERGENCY REVIEW

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Information collection request; comments solicited.

SUMMARY: The Department of Homeland Security has submitted the following information collection request (ICR), utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (P.L. 104–13, 44 U.S.C. Chapter 35). OMB approval has been requested by August 5, 2003. A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Agency Clearance Officer at the Bureau of Customs and Border Protection, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1429. Comments and questions about the ICR listed below should be forwarded to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Bureau of Customs and Border Protection, Office of Management and Budget, Room 10235, Washington, DC 20503.

SUPPLEMENTARY INFORMATION:

The Office of Management and Budget is particularly interested in comments which:

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarify of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Agency: Bureau of Customs and Border Protection

Title: Application—Alternative Inspection Services/FAST Commercial Driver Application

OMB Number: 1653–0010

Type of Review: Emergency Revision

Affected Public: Commercial Truck Drivers

Number of Respondents: 25,000

Estimated Time Per Respondent: 30 minutes

Total Burden Hours: 12,500

Total Burden Cost: $750,000

Description: A new form has been developed for commercial truck drivers, known as the FAST Commercial Driver Application—Mexico, CBP 823F. FAST is a clearance process for known low risk shipments. This program seeks to expedite clearance of low risk trans-border shipments by reducing CBP information requirements, and by dedicating lanes at major crossing points to FAST participants. It is an expansion of the Free and Secure Trade Initiative to the U.S. southern border. FAST membership will help companies satisfy the security requirements of their customers and service providers. This program has been operating on the northern border using a Canadian/U.S. form, administered and collected by the Canadian Government.

Dated: July 22, 2003

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, August 5, 2003 (68 FR 46211)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, August 13, 2003,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF CARPENTERS' APRONS OF LENGTHS OF TWENTY INCHES AND TWENTY-TWO INCHES MADE OF DURABLE FABRIC AND WHICH AFFORD PROTECTION TO THE CLOTHING WORN UNDER THE APRON

AGENCY: U.S. Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of modification of ruling letters and revocation of treatment relating to the tariff classification of carpenters' aprons of lengths of twenty inches and twenty-two inches that are made of durable fabric and cover a significant aspect of the wearer's clothing such that they afford protection for the clothing worn under the aprons.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is modifying two ruling letters relating to the classification of carpenters' aprons. CBP is also revoking any treatment previously accorded by it to substantially identical transactions.

Notice of the proposed action was published on May 14, 2003, in the *Customs Bulletin*, Volume 37, Number 20. One comment was received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 26, 2003.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textiles Branch: (202) 572–8790.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerged from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice proposing to modify Headquarters Ruling Letter (HQ) 084324 (July 26, 1989) and New York (NY) A81801 (April 10, 1996) was published in the *Customs Bulletin*, Volume 37, Number 20, on May 14, 2003. One comment was received in response to the notice of proposed action. The comment suggested that carpenters' aprons, such as those in the ruling letters subject to modification, are not used to protect a carpenter's clothing but are, rather, used to organize and carry carpenters' tools. The comment noted that the garments are traditionally called "aprons," but stated that they might more appropriately be referred to as "tool pouches."

As was stated in the notice of proposed action, the notice covered any rulings which may have existed but which had not specifically been identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, which classified substantially similar merchandise contrary to the notice, should have advised CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C.1625 (c)(2)) as amended by section 623 of Title VI, CBP is re-

voking any treatment previously accorded by CBP to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should have advised CBP during the notice period. An importer's failure to have advised CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importation of merchandise subsequent to the effective date of this notice.

Customs and Border Protection in HQ 084324 and NY A81801 concluded that carpenters' aprons of lengths of twenty inches and twenty-two inches, respectively, made of cotton fabric were classified in subheadings 6307.90.9930 and 6307.99.9089, HTSUSA. CBP classified the merchandise as "other made-up articles."

After reviewing HQ 084324 and NY A81801, it is CBP's determination that they are erroneous as they relate to the carpenters' aprons of lengths of twenty inches and twenty-two inches. Carpenters' aprons of the above-lengths are "other protective clothing" and properly classified as "other garments" in subheading 6211.42.0081, HTSUSA. Headquarters Ruling Letters 966339 and 966244, modifying HQ 084324 and NY A81801, are set forth as Attachments "A" and "B" to this document.

The carpenters' aprons in issue are properly identified as "other protective clothing." The garments are "of a kind that have special design features or unique properties that distinguish them from other garments that are not used for protective purposes." HQ 959136 (Nov. 27, 1996). The aprons are made of durable fabric and cover a significant aspect of the wearer's clothing such that they afford protection for the clothing worn under the aprons. The articles may be used to organize carpenters' tools, but they particularly afford protection for carpenters' clothing.

This ruling will become effective, in accordance with 19 U.S.C. 1625 (c), sixty (60) days after publication in the *Customs Bulletin*.

DATED: July 31, 2003

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966244
July 31, 2003
CLA–2 RR:CR:TE 966244 jsj
CATEGORY: Classification
TARIFF NO.: 6211.42.0081

MR. GORDON C. ANDERSON
C. H. ROBINSON INTERNATIONAL, INC.
8100 Mitchell Road
Suite 200
Eden Prairie, Minnesota 55344

Re: Modification of NY A81801 (April 10, 1996); "Carpenter's Super Bib Apron"; "Other Protective Clothing"; Heading 6211, HTSUS; Explanatory Note 62.14.

DEAR MR. ANDERSON:

The purpose of this correspondence is to respond to a request of the National Commodity Specialist Division of the Bureau of Customs and Border Protection (CBP) to reconsider New York Ruling Letter A81801 (April 10, 1996). New York Ruling Letter A81801 was issued to C. H. Robinson International, Inc. on the behalf of its client, Portable Products. The article in issue in NY A81801 that is subject to this reconsideration and modification is the "Carpenter's Super Bib Apron."

CBP, subsequent to reconsidering NY A81801, is modifying that ruling letter as it relates to the classification of the "Carpenter's Super Bib Apron" pursuant to the analysis set forth in this ruling letter.

Pursuant to section 625 (c), Tariff Act of 1930, as amended, 19 U.S.C. 1625 (c), notice of the proposed modification of NY A81801 was published on May 14, 2003, in the Customs Bulletin, Volume 37, Number 20. One comment was received.

Facts:

The article in issue, as identified by C. H. Robinson International and Portable Products, is the "Carpenter's Super Bib Apron." It was described in NY A81801 as follows:

> The first sample [is] identified as a "Carpenter's Super Bib Apron". You note that although the submitted sample is made in the United States, future aprons will be made in China. The apron measures approximately 22 1/2 inches in width at the waist and tapers to 10 inches wide at the bib area and is approximately 22 inches in length. The apron is stated to be constructed of 12 oz. cotton duck and has two adjustable nylon web style straps with plastic buckles, one strap for the neck and one for the waist. Sewn on the apron are 16 pockets of various sizes which are located all along the waist and one large pocket with two pencil/drill pockets at the chest area. These pockets are stated to be designed and marketed to hold objects ranging from traditional carpenter tools, to fasteners, glue, pencils, drill bits and pocket calculators. In addition to the pockets are two web straps located on both ends of the waist which are stated to be designed to hold hammers. The accompanying retail packaging for the article shows the apron with its intended uses as well how it would be worn.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described "Carpenter's Super Bib Apron" that measures approximate twenty-two (22) inches in length?

Law and Analysis:

The federal agency responsible for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is the Bureau of Customs and Border Protection.[1] CBP, in accordance with its legislative mandate, classi-

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[1] *See* 19 U.S.C. 1500 (West 1999) (providing that the Customs Service is responsible for fixing the final appraisement, classification and amount of duty to be paid); *See also* Joint Explanatory Statement of the Committee

fies imported merchandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.[2]

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." General Rule of Interpretation 1. General Rule of Interpretation 1 further states that merchandise which cannot be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation, provided the HTSUSA chapter headings or notes do not require otherwise. According to the Explanatory Notes (EN), the phrase in GRI 1, "provided such headings or notes do not otherwise require," is intended to "make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount." General Rules for the Interpretation of the Harmonized System, Rule 1, Explanatory Note (V).

The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. See Joint Explanatory Statement supra note 1, at 549. The Explanatory Notes, although neither legally binding nor dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUS. The EN's are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989); Lonza, Inc. v. United States, 46 F. 3d 1098, 1109 (Fed. Cir. 1995).

Commencing classification of the "Carpenter's Super Bib Apron," in accordance with the dictates of GRI 1, CBP examined the headings of the HTSUSA. Heading 6211, HTSUS, provides for: "Track suits, ski-suits and swimwear; other garments." The Explanatory Notes, particularly EN 62.11, provide, in part, that "[t]he provisions of the Explanatory Notes * * * to heading 61.14 concerning other garments apply, mutatis mutandis, to the articles of this heading." Explanatory Note 61.14 provides, in part, that "[t]he heading includes *inter alia*: (1) Aprons, boiler suits (coveralls), smocks, and other protective clothing of a kind worn by mechanics, factory workers, surgeons, etc."

CBP, relying on EN 61.14, has previously concluded that "other protective clothing" classifiable in heading 6211, HTSUS, as "other garments" are garments "of a kind that have special design features or unique properties that distinguish them from other garments that are not used for protective purposes." HQ 959136 (Nov. 27, 1996). See also HQ 961826 (Feb. 2, 1999), HQ 959974 (April 7, 1997), HQ 957362 (Mar. 27, 1995), and HQ 084087 (Sept. 7, 1989). The "Carpenter's Super Bib Apron" is designed to protect the wearer's clothing while engaged in carpentry or similar shop work. See HQ 961184 (Aug. 7, 1998), HQ 959540 (April 7, 1997). The apron is made of durable fabric and covers a significant aspect of the wearer's clothing such that it affords protection for the clothing worn under the apron.

Continuing the classification of the "Carpenter's Super Bib Apron," the article, made of cotton duck fabric is classified in subheading 6211.42.0081, HTSUSA. Subheading 6211.42.0081, HTSUSA, provides for:

6211	Track suits, ski-suits and swimwear; other garments:
	Other garments, women's or girls:
6211.42.00	Of cotton,
6211.42.0081	Other.

The apron, at the subheading level, is classified as a "women's or girls'" garment pursuant to Chapter 62, Note 8. Since the garment cannot be identified as either a men's or boys' or a women's or girls' article, the chapter note dictates that it be classified as a women's or girls' article.

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of Conference, H.R. Conf. Rep. No. 100–576, at 549 (1988) *reprinted in* 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

[2] *See* 19 U.S. C. 1202 (West 1999); *See generally, What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of Customs and Border Protection available on the World Wide Web site of CBP at www.cbp.gov.

Holding:

New York Ruling Letter A81801 (April 10, 1996) has been reconsidered and is modified as it relates to the "Carpenter's Super Bib Apron."

The "Carpenter's Super Bib Apron" is classified in subheading 6211.42.0081, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty is eight and two-tenths (8.2) percent, *ad valorem*.

The textile quota category is 359.

This ruling letter, in accordance with 19 U.S.C. 1625 (c), will become effective sixty (60) days after its publication in the Customs Bulletin.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest your client check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, previously available on the Customs Electronic Bulletin Board (CEBB), which is now available on the CBP web site at: www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Gail A. Harmill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN WORKS TRUCKS AND TRANSAXLES THEREFOR

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of two ruling letters and revocation of treatment relating to the tariff classification of certain works trucks and transaxles therefor under the Harmonized Tariff Schedule of the United States ("HTSUS").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two ruling letters concerning the tariff classification of certain works trucks and transaxles therefor under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocations was published on May 28, 2003, in Vol. 37, No. 22 of the *Customs Bulletin*. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 26, 2003.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 572–8776.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke Headquarters Ruling Letters ("HQs") 954982 and 953670, dated November 17 and July 16, 1993, respectively, as they pertain to the classification of certain works trucks and transaxles therefor, was published on May 28, 2003, in Vol. 37, No. 22 of the *Customs Bulletin*. No comments were received in response to this notice.

As stated in the proposed notice, the revocation action will cover any rulings on this merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings other than those herein identified; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical

transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to the effective date of this final decision.

The classification of the transaxles at issue must be determined with due consideration of the classification of the Workman 3000 Series vehicles. As is detailed in the attachment, the Workman 3000 Series vehicles are subject of ruling HQ 954982 which, in reference to HQ 953670, dated July 16, 1993, classified the Workman 3000 under heading 8704, HTSUS, which provides for "motor vehicles for the transport of goods[.]" However, Customs has issued several rulings concerning the classification of articles that are substantially similar to the Workman 3000 and classified those articles as works trucks under heading 8709, HTSUS. The rulings cited are as follows: HQ 965246, dated November 6, 2001; New York Ruling Letter ("NY") G87244, dated February 27, 2001; NY C83109, dated January 29, 1998; HQ 960303, dated May 13, 1997; HQ 954173, dated September 22, 1993.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQs 954982 and 953670, and any other ruling not specifically identified, to reflect the proper classification of the works trucks and transaxles therefor, pursuant to the analysis in Headquarters Ruling Letter (HQ) 966332, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

Dated: August 5, 2003

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966332
August 5, 2003
CLA–2 RR:CR:GC 966332 AML
CATEGORY: Classification
TARIFF NO.: 8709.90.00

MR. JOHN MATTSON
NORMAN G. JENSEN, INC.
3050 Metro Drive, Suite #300
Minneapolis, Minnesota 55425

RE: Transaxle; Workman 3000 Series Vehicles; HQs 954982 and 953670 revoked

DEAR MR. MATTSON:

This is in regard to Headquarters Ruling Letters ("HQs") 954982 and 953670, dated November 17 and July 16, 1993, respectively, issued to you on behalf of the Toro Company, regarding the tariff classification of a transaxle for the Workman 3000 Series Vehicles (hereinafter "Workman 3000") under the Harmonized Tariff Schedule of the United States (HTSUS). We have reconsidered the classification determinations made in those rulings and determined that they are incorrect. This letter sets forth the correct classification of both the Workman 3000 and the transaxles therefor.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of HQs 954982 and 953670 was published on May 28, 2003, in Vol. 37, No. 22 of the *Customs Bulletin*. No comments were received in response to this notice.

Facts:

We described the transaxles in HQ 953670 as follows:

> The article under consideration is a transaxle for the Workman 3000 Series Vehicles. The Workman 3000 is a relatively small 4-wheel work vehicle that features two front seats and an open cargo area for the transport of merchandise. The vehicle can be used in a variety of settings (park and sports grounds, worksites, factories, agricultural fields, etc.) and it comes in a variety of models which are portrayed in the submitted brochure.
>
> The Workman 3000 Series utilizes the Toro transaxle which is incorporated into one die cast aluminum housing. The unit has a 3-speed synchromesh transmission for smooth, easy shifting and quiet operation, a high-low range that delivers six distinct work ratios, a manual difflock to kick in extra traction when required, high efficiency spiral bevel differential gears, and an integrated hydraulic strainer and pump. This component is directly coupled to an engine with an automotive type bell housing, and a clutch to complete an all-enclosed power train.

We issued HQ 954982 to modify HQ 953670. Thus, both rulings were issued based on the same operative facts.

Issue:

What is the classification of the transaxle designed for use in the Workman 3000 Series Vehicles under the HTSUS?

Law and Analysis:

Central to the classification of the transaxles is the classification of the Workman 3000 itself. We stated in HQ 953670 that:

> Before we can determine the classification of the transaxle, we must determine the classification of the Workman 3000 Series vehicles. The Workman 3000 Series vehicles are classified under heading 8704, HTSUS, which provides for "Motor vehicles for the transport of goods* * * *" See, Headquarters Ruling Letter (HRL) 082797 dated July 14, 1989, which classified a Mitsubishi lightweight vehicle under heading 8704, HTSUS.

It is this determination that we have reconsidered and now find to be erroneous. The correct analysis and classification are set forth below.

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRIs). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The HTSUS provisions under consideration are as follows:

8704	Motor vehicles for the transport of goods:
	Other, with spark-ignition internal combustion piston engine:
8704.31.00	G.V.W. not exceeding 5 metric tons
* * * * * * *	
8709	Works trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; tractors of the type used on railway station platforms; parts of the foregoing vehicles:
8709.90.00	Parts.

The classification of the transaxle must be determined with due consideration of the classification of the Workman 3000 Series vehicles. As detailed in the "facts" section above, the Workman 3000 Series vehicles are subject of ruling HQ 954982 which, in reference to HQ 953670, dated July 16, 1993, classified the Workman 3000 under heading 8704, HTSUS, which provides for "motor vehicles for the transport of goods[.]" However, in a recent request for reconsideration, several rulings concerning the classification of articles that are substantially similar to the Workman 3000 and classify those articles as works trucks under heading 8709, HTSUS were identified.

The rulings cited are as follows:

In HQ 965246, dated November 6, 2001, after considering and distinguishing the characteristics of articles classifiable under heading 8704 and 8709, HTSUS, we classified a "Micro Truk" under heading 8709, HTSUS as a works truck. In so doing, we emphasized "certain design features" that are common to such articles:

> Among these are their construction and special design features which make them unsuitable for the transport of goods by road or other public ways; their top speed when laden is generally not more than 30 to 35 km/h; their turning radius is approximately equal to the length of the vehicle itself; vehicles of heading 8709 do not usually have a closed driving cab, the accommodation for the driver often being no more than a platform on which to stand. HQ 965246 at page 3.

In New York Ruling Letter ("NY") G87244, dated February 27, 2001, we classified a John Deere 1800 Utility vehicle under heading 8709, HTSUS, as a works truck. In so classifying the article we emphasized its design features and characteristics as follows:

> It is a four-wheel, self-propelled utility vehicle and is used to haul materials in factories and warehouses and on golf courses, sports fields and nurseries. It has a 4-cycle, gasoline, 18 horsepower engine that can attain a maximum speed of 11.5 mph. The vehicle has a two-speed transaxle and large-diameter tires for traction. The vehicle has an open operator's platform and comes with a cargo box capable of hauling materials up to 1500 lbs. The tailgate can be removed and the sides lowered to provide a flatbed surface. The vehicle's turning radius (120.5 inches) is approximately equal to its length (102 inches). You state that the vehicle does have attachments. It has a sun canopy kit to shield the operator from inclement weather. It also has an auxiliary hydraulics kit to power attachments and a Cushman TD1500 Top Dresser. The Cushman Core Harvester and a cradle attachment

can also be adapted to the John Deere 1800 Utility Vehicle. NY G87244 at 1.

We reached similar conclusions, *i.e.*, we classified vehicles similar to the Workman 3000 under heading 8709, HTSUS, in several other rulings: NY C83109, dated January 29, 1998, in which the John Deere Gator Utility vehicle was so classified; HQ 960303, dated May 13, 1997, in which the Club Car utility vehicle was so classified; HQ 954173, dated September 22, 1993, in which the Mule utility vehicle was so classified.

We also considered the determinations made in HQs 082797, dated July 14, 1989, and 086305, dated January 24, 1990, both of which concerned the classification of the Mighty Mits line of lightweight work vehicles under heading 8704, HTSUS. HQ 086305 modified HQ 082797 as it pertained to the Mighty Mit model equipped with a dumper. We have examined those files, the images and literature contained therein and conclude that the articles therein in question were, given the evidence presented, properly classified. That is, the Mighty Mits, because of several design features that do not comport with those described in the ENs to heading 8709, HTSUS, set forth below, are readily distinguishable from the Workman 3000 articles before us.

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to heading 8709, HTSUS, provide, in pertinent part, as follows:

> This heading covers a group of self-propelled vehicles of the types used in factories, warehouses, dock areas or airports for the short distance transport of various loads (goods or containers) or, on railway station platforms, to haul small trailers.
>
> Such vehicles are of many types and sizes. They may be driven either by an electric motor with current supplied by accumulators or by an internal combustion piston engine or other engine.
>
> The main features common to the vehicles of this heading which generally distinguish them from the vehicles of heading 87.01, 87.03 or 87.04 may be summarised as follows:
>
> (1) Their construction and, as a rule, their special design features, make them unsuitable for the transport of passengers or for the transport of goods by road or other public ways.
>
> (2) Their top speed when laden is generally not more than 30 to 35 km/h.
>
> (3) Their turning radius is approximately equal to the length of the vehicle itself.
>
> Vehicles of this heading do not usually have a closed driving cab[.]
>
> * * * * * * *
>
> Works trucks are self-propelled trucks for the transport of goods which are fitted with, for example, a platform or container (sometimes designed for elevating) on which the goods are loaded.
>
> * * * * * * *

The evidence provided establishes that the Workman 3000 is a small, 4-wheeled, self-propelled work vehicle with two front seats and an open cargo area in the rear designed for the short distance transport of merchandise. The turning radius is less than the length of the vehicle, its top speed without load is less than 25 miles per hour, and none of the models are equipped with lifting or handling equipment. The vehicles are marketed to be used for landscaping, facility maintenance, agricultural and warehouse use. Given the apparent descriptive similarity of the Workman 3000 to other works trucks classified under heading 8704, HTSUS (which were subject of the

prior rulings discussed at length above), we compared the image of the Workman 3000 with the images of those vehicles provided on their respective websites. We conclude following this visual comparison that the Workman 3000 is substantially similar in form and intended use to those vehicles.

Based upon the holdings of the rulings cited above and the satisfaction of the criteria set forth in the ENs, we conclude that the Workman 3000 is properly classified under heading 8709, HTSUS, as a works truck. Accordingly, those rulings that classify the Workman 3000 under headings other than 8709, HTSUS, are being revoked.

The ENs to heading 8709, HTSUS, provide, pertaining to the classification of parts, the following:

This heading also covers parts of the vehicles specified in the heading, provided the parts fulfil both the following conditions:

(i) They must be identifiable as being suitable for use solely or principally with such vehicles; and

(ii) They must not be excluded from this heading by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note).

Parts of this heading include:

(6) Axles.

The evidence presented is that the transaxles at issue are designed and manufactured solely for use in the Workman 3000. Thus, they are classifiable as parts of a works truck under heading 8709, HTSUS.

Holding:

The transaxle for the Workman 3000 Series Vehicles is classified under subheading 8709.90.00, HTSUS, which provides for, *inter alia*, parts of works trucks.

Effect on Other Rulings:

HQs 954982 and 953670 are **REVOKED**. In accordance with 19 U.S.C. § 1625 (c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN SELENIUM COATED GLASS PANELS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of a ruling letter and revocation of treatment relating to the tariff classification of certain selenium coated glass panels under the Harmonized Tariff Schedule of the United States ("HTSUS").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises inter-

ested parties that Customs is revoking a ruling letter concerning the tariff classification of certain selenium coated glass panels under the HTSUS. Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocations was published on June 18, 2003, in Vol. 37, No. 25 of the *Customs Bulletin*. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 26, 2003.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 572–8776.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke New York Ruling Letter ("NY") H86817, dated January 30, 2002, as it pertains to the classification of certain selenium coated glass panels, was published on June 18, 2003, in Vol. 37, No. 25 of the *Customs Bulletin*. No comments were received in response to this notice.

As stated in the proposed notice, the revocation action will cover any rulings on this merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings other than those herein identified; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice

memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to the effective date of this final decision.

The selenium coated glass panels at issue constitute an essential part of a device that measures and detects radiations, *e.g.*, a TFT panel. Based on the information provided, we have determined that these are solely or principally used in apparatus of heading 9022, HTSUS. They are not, as we previously determined in NY H86817, used in devices of the type described in heading 9030, HTSUS.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY H86817, and any other ruling not specifically identified, to reflect the proper classification of the selenium coated glass panels, pursuant to the analysis in Headquarters Ruling Letter (HQ) 966459, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

DATE: August 5, 2003

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966459
August 5, 2003
CLA–2 RR:CR:GC 966459 AML
CATEGORY: Classification
TARIFF NO.: 9022.90.60

MR. JONATHAN BECK
TOWER GROUP INTERNATIONAL
810 Cromwell Park Drive, Suite E
Glen Burnie, MD 21061–2562

RE: NY H86817 revoked; Binding ruling concerning selenium coated panels for Thin Film Transistor ("TFT") instruments

DEAR MR. BECK:

This is in reference to New York Ruling Letter ("NY") H86817, dated January 30, 2002, issued to you on behalf of Direct Radiography Corporation, concerning classification of certain selenium coated, X-ray detector arrays or panels for Thin Film Transistor ("TFT") instruments, under the Harmonized Tariff Schedule of the United States ("HTSUS"). We have reconsidered the classification made in NY H86817 and determined that it is incorrect. This ruling sets forth the correct classification.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of NY H86817 was published on June 18, 2003, in Vol. 37, No. 25 of the *Customs Bulletin*. No comments were received in response to this notice.

Facts:

We described the articles in NY H86817 as follows:

> In its imported state, no sample provided, "the panel would consist of TFT (Thin Film Transistor) panels laminated to a sheet of glass for added strength. These panels would have amorphous selenium coated onto the panel."
>
> From the information provided, the imported detector array is 14 by 17 inches in size and is the "heart" of the digital detector. This import will lack the electronics of the controller/computer which will be needed to produce images from its electrical output. The final images will be similar to, but more precise than, the images produced on a traditional, direct view, X-ray screen. The imported array will produce electricity proportional to the intensity of X-rays striking each small area of the device.

In NY H86817, we classified the TFT panels under subheading 9030.10.00, HTSUS, which provides for instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionizing radiations.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of NY H86817 was published on June 18, 2003, in Vol. 37, No. 25 of the *Customs Bulletin*. No comments were received in response to this notice.

Issue:

What is the essential character and classification of the coated, laminated TFT panels under the HTSUS?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The HTSUS provisions under consideration are as follows:

7007	Safety glass, consisting of toughened (tempered) or laminated glass:
	Laminated safety glass:
7007.29.00	Other.
* * * * * * *	
9022	Apparatus based on the use of X-rays or of alpha, beta or gamma radiations, whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus, X-ray tubes and other X-ray generators, high tension generators, control panels and desks, screens, examination or treatment tables, chairs and the like; parts and accessories thereof: Apparatus based on the use of X-rays, whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus:
9022.90	Other, including parts and accessories:
	Other:
9022.90.60	Of apparatus based on the use of X-rays.
* * * * * * *	
9030	Oscilloscopes, spectrum analyzers and other instruments and apparatus for measuring or checking electrical quantities, excluding meters of heading 9028; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionizing radiations; parts and accessories thereof:
9030.90	Parts and accessories:
	Other:
9030.90.88	Other.

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

In classifying the articles, Note 1 to Chapter 90 provides, in pertinent part, that:

> 1. This chapter does not cover:
>
> * * * * * * *
>
> (e) Goods of heading 7007, 7008, 7011, 7014, 7015 or 7017[.]

Similarly, Chapter Note 1(d) to Chapter 70, HTSUS, states that that chapter does not cover " * * * optically worked optical elements * * * of [C]hapter 90[.]" Therefore, if the articles are classified in Chapter 70, they cannot fall to be classified in Chapter 90.

Heading 7007, HTSUS, provides, in pertinent part, for safety glass consisting of laminated glass.

EN 70.07, provides, in pertinent part, that:

> The term "safety glass" covers only the types of glass described below and does not refer to protective glass such as ordinary wired glass and selective absorption glasses (*e.g.*, anti-glare glass, X-ray protective glass).

* * * * * * *

> Safety glass *incorporated in other articles* and *thus in the form of parts* of machines, appliances or vehicles *is classified with* those machines, appliances or vehicles (emphasis added).

We find that the laminated panels of glass, in and of themselves, would not be referred to commercially as "safety glass." The unrefuted evidence is that the Korean TFT panels are laminated with a glass backing only to provide stability in transit. There is no indication that the lamination enhances in any manner the function of the TFTs when they are complete. The addition of the selenium coating (in preparation for use as parts of X-ray apparatus) prior to entry supports this conclusion.

Hence, the articles are not classifiable as articles of glass within Chapter 70 and therefore Note 1 to Chapter 90 does not exclude the articles from classification within Chapter 90.

Once the panels are coated with selenium in Canada, they have been further worked, and, for tariff purposes, can no longer be considered mere panels of laminated glass. However, as imported, they are incomplete or unfinished articles which must be further processed into detector modules which are X-ray receptor devices whose function is to detect radiations, convert them to light then to electrical signals. A CT scanner then processes these signals to create images that are displayed on a monitor. Information available to us with respect to substantially similar glass panels indicates that the further processing whereby the selenium coated glass panels are completed into X-ray receptor devices or digital detectors includes the depositing of additional, unspecified proprietary coatings on top of the selenium, attachment of various electronic components around the periphery of the glass panels, followed by mounting each assembled panel into a mechanical frame along with printed circuit assemblies and other electronic assemblies and cables.

GRI 2(a) provides, in pertinent part that "any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article." The evidence presented indicates that it is the selenium coating that renders the TFT panels capable of performing their intended function of capturing X-ray radiations in the form of an electrical charge. Without this coating the panels are incapable of being used as digital detectors. From this, we conclude that the selenium coating imparts the essential character to the TFT panels, such that, for tariff purposes, they are to be classified as complete or finished digital detectors or X-ray receptor devices.

In Protest Review Decision 965641, dated September 30, 2002, we classified, among other things, component articles involved in the detection of x-rays under heading 9022, HTSUS. In so doing we stated:

> In this case, it is our opinion that the detector module, which is a basic element in the receptor assembly in the gantry, is not an "apparatus" within the meaning of heading 9022. It is not like the other named components, such as an X-ray tube, generator, control panel or screen, which function as distinct components of the apparatus of heading 9022. In HQ 952358 (October 13,1992) we classified an X-ray image intensifier tube as an apparatus of heading (sic) 9022.90.20, HTSUS (1992). The image intensifier tube consisted of a tube, high-tension generator and test plate enclosed in a housing. The intensifier tube was used with an optical device (attached to the tube) in order to display the image that was generated by the intensifier tube from radiation from an X-ray machine. As such, the image intensifier was held to be classifiable as an apparatus, arguably in the same manner as a high-tension generator.
>
> The detector module is an X-ray receptor device that detects individual radiations (scintillations) and converts them to light that is then converted to electrical signals which provide data as to the brightness and location of the scintillations. These signals are then used and processed, in this case, by a CT scanner to create an image. The detector module is that part of the receptor system in a CT scanner that merely detects and converts the degree of radiation that has passed through an object. It is not a separate apparatus of heading 9022. We note that the EN

9022(III), (A) through (F) on pages 1819 to 1820 of the Explanatory Notes to the Harmonized Commodity Description and Coding System (HS), Third Edition (2002), describes various "apparatus" that are classifiable as apparatus in heading 9022. Items (A) through (F) describe devices which either generate an X-ray beam or other radiation, or which function as a display, control system or furniture specialized for X-ray work. A detector module is not like these apparatus. It is, however, a necessary and essential component of a CT scanner and, therefore, satisfies the basic test for a "part" of a good.

Note 2 to Chapter 90 directs classification of parts of apparatus of heading 9022 to that heading if they are solely or principally used with such apparatus, provided that the parts are not goods of another heading of chapter 84, 85, 90 or 91. Heading 9030 in Chapter 90 provides, in pertinent part, "for instruments and *apparatus for measuring or detecting* alpha, beta, gamma, X-ray, cosmic or other ionizing radiations" (underscoring added for emphasis). Whereas the detector module appears to satisfy the terms of this heading, we again point out that the detector modules are not complete measuring or detecting devices in and of themselves. They function to receive and convert radiation into electrical signals and are designed to be incorporated into a device. EN 9030 (A), pages 1846 to 1847 of the HS Explanatory Notes, describes devices which receive, record and provide information as to what has been measured or detected. By itself, a detector module is incomplete as a measuring or detecting apparatus. As indicated previously, it constitutes an essential part of a device that measures and detects radiations, *e.g.*, a CT scanner. Based on the information provided by the protestant, these are solely or principally used in apparatus of heading 9022. They are not used in devices of the type described in heading 9030.

Therefore, we conclude that the detector modules are not apparatus of heading 9030, that they are parts of apparatus of heading 9022, and, therefore, pursuant to Note 2(b) to Chapter 90, the detector modules are classifiable as parts of apparatus based on the use of X-rays in heading 9022, and specifically in subheading 9022.90.60, HTSUS. *HQ 965641 at pp. 5–6.*

As indicated in HQ 965641, Note 2 to Chapter 90, HTSUS, provides, in pertinent part, as follows:

Subject to Note 1 above, parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:

(a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;

(b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013, or 9031) are to be classified with the machines, instruments or apparatus of that kind;

(c) All other parts and accessories are to be classified in heading 9033.

In compliance with Note 2 to Chapter 90 and the language of heading 9022, HTSUS, and because the evidence presented establishes that the subject panels are suitable for use solely or principally with goods of heading 9022, HTSUS, they are classified in heading 9022, HTSUS.

Holding:

The subject selenium coated TFT glass panels are classified under subheading 9022.90.60, HTSUS, which provides for other parts and accessories of apparatus based on the use of X-rays.

Effect on Other Rulings:

NY H86817 is revoked. In accordance with 19 U.S.C. § 1625 (c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
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Timothy C. Stanceu

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Nicholas Tsoucalas
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Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 03–100)

WASHINGTON INTERNATIONAL INSURANCE CO., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 92–04–00252

[Upon stipulation of the facts in lieu of trial regarding steel imports, judgment for the defendant.]

(Decided: August 8, 2003)

Sandler, Travis & Rosenberg, P.A. (*Beth C. Ring*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Aimee Lee*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Chi S. Choy*), of counsel, for the defendant.

MEMORANDUM

AQUILINO, *Judge:* This action consolidates claims by the plaintiff for refunds of duties assessed by the U.S. Customs Service on the full value of imports of stainless steel, as opposed to only on the value of its processing outside the United States per item 806.30 of the Tariff Schedules of the United States ("TSUS"), which duty exemption applied to

> [a]ny article of metal (except precious metal) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from processing outside of the United States, is returned to the United States for further processing[.]

I

To be "manufactured in the United States", there "must be transformation; a new and different article must emerge, 'having a dis-

tinctive name, character, or use.' " *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908). An article may be "subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product." *Tide Water Oil Co. v. United States*, 171 U.S. 210, 216 (1898). A "process of manufacture" advances an article in condition or value such that the article is more than it was in its original state. *See, e.g., United States v. Oxford Int'l Corp.*, 62 CCPA 102, 106, 517 F.2d 1374, 1377–78 (1975); *United States v. Flex Track Equip. Ltd.*, 59 CCPA 97, 101, 458 F.2d 148, 151–52 (1972); *Ford Motor Co. v. United States*, 19 CCPA 69, 71, T.D. 44897 (1931). It is well-established, though, that certain processes are not manufacturing. *See, e.g., Lackawanna Steel Co. v. United States*, 10 Ct.Cust.Appls. 93, 94–95, T.D. 38359 (1920) (crushing rock such that it was "rendered into the imported sizes solely to facilitate and economize in transportation" not a manufacturing process); *Firestone Tire & Rubber Co. v. United States*, 71 Cust.Ct. 63, 66, C.D. 4474, 364 F.Supp. 1394, 1397 (1973) ("mere cleansing of an article, or 'getting it by itself', [ ] not a manufacturing process"). Morever, "[e]very application of labor is not a manufacturing process[,] and it has long been held that an operation which is necessary to get an article of commerce by itself is not such a process." *George Beurhaus Co. v. United States*, 32 Cust.Ct. 269, 271, C.D. 1612 (1954), citing *United States v. Sheldon & Co.*, 2 Ct.Cust.Appls. 485, T.D. 32245 (1912); *Cone & Co. v. United States*, 14 Ct.Cust.Appls. 133, T.D. 41672 (1926); *United States v. U.S. Rubber Co.*, 31 CCPA 174, C.A.D. 269 (1944); *V.W. Davis v. United States*, 10 Cust.Ct. 189, C.D. 751 (1943); *J.E. Bernard & Co. v. United States*, 30 Cust.Ct. 122, C.D. 1509 (1953). In *Beurhaus*, for example, pumpkin seed kernels were held to have been imported unmanufactured where their foreign processing consisted of removing the kernels from whole seeds and drying them out:

> * * * Defendant claims that the imported merchandise has been partially manufactured because shelling or peeling the seeds was one of the steps necessary to the development of the finished article. It might likewise be claimed that removing the seeds from the pumpkin and taking the pumpkin from the vine were such steps. All of those operations were, of course, necessary to the production of the finished article, but they were primarily required for the purpose of obtaining the seed kernels free from the pods.

32 Cust.Ct. at 271. Similarly, in *United States v. Salomon*, 1 Ct.Cust.Appls. 246, 249, T.D. 31277 (1911), the court held that cotton waste, which had been treated and bleached, was not "advanced in value by a [ ] * * * manufacturing process".

II

In the light of this law long settled, come the parties to this action with a Stipulation of Material Facts in Lieu of Trial, which the court has reviewed and approved as having "be[en] submitted for decision in lieu of trial on" its contents.[1] They include the following:

> 4. Plaintiff * * * is the surety on the customs bonds for the entries subject to this action.
>
> 5. The importer of record on the subject entries during the relevant time period[ ] was either Newmet Corporation or Newmet Steel Corporation (collectively referred to as "Newmet").* * *
>
> 6. Newmet was engaged in the business of selling in the United States[ ] finished or semi-finished stainless and electrical steel products which were purchased from foreign steel mills on a scrap conversion basis, meaning that Newmet supplied scrap to the foreign steel mills and paid them for converting the scrap into the imported stainless steel sheets, plates and strips.
>
> 7. Newmet obtained orders for the imported semifinished or finished stainless steel sheets, plates or strips from steel fabricators in the United States, which such fabricators would further process by straightening, slitting and cutting to size for further sale to manufacturers of a variety of stainless steel products.
>
> * * * * * * *
>
> 9. The imported merchandise consists of stainless steel sheets, plates and strips and are articles of metal other than precious metal.
>
> 10. The merchandise covered by the subject entries * * * [was] processed abroad by foreign steel mills from stainless steel scrap that had been exported from the United States.
>
> 11. The exported scrap (hereinafter also referred to, for purposes of this stipulation, as "prepared scrap") [ ] was the raw material from which the imported products were manufactured * * * by the foreign steel mills.
>
> 12. The subject imported stainless steel sheets, plates and strips were imported into the United States for further processing into various stainless steel products.

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[1] The court's jurisdiction over this consolidated action is pursuant to 28 U.S.C. §§ 1581(a), 2631(a).
In addition to their stipulation, the plaintiff has filed a motion for summary judgment, and the defendant has countered with a motion for judgment upon the stipulation.

13. The subject entries were liquidated with duty assessed on the full value of the imported merchandise.

* * * * * * *

15. The "scrap" as it enters the * * * yard (hereinafter also referred to as "incoming scrap") was not solely of U.S. origin but consisted of scrap of U.S. and foreign origin that were commingled.

* * * * * * *

17. The Customs Service issued 2 rulings in connection with this matter: HQ 555096, July 7, 1989 and HQ 555557, April 15, 1991, which are attached to this stipulation.

* * * * * * *

19. The scrap yards dealt with two types of scrap: "obsolete" and "industrial".* * *

20. "Obsolete" scrap, also known as "old solids," consist of metal machinery that is no longer usable.

21. "Industrial" scrap is comprised of two types: (i) "turnings," and (ii) "new solids". "Turnings" are small pieces of metal, approximately 1 inch in size or smaller and less than 1/8 inch thick, that result from milling bars of stainless steel into the correct size, such as in the manufacture of screwdrivers or screws. About 10 percent of the incoming scrap consisted of turnings. "New solids" are the discarded trimmings resulting from the process of manufacturing articles and components from stainless steel sheets and bars.

* * * * * * *

23. The scrap yards generally perform three categories of operations on the incoming scrap: (i) testing and segregating; (ii) sizing; and (iii) packaging.

24. Testing and segregating consisted of identifying the alloy metal content of the incoming scrap and segregating it into containers based on its chemical composition. All incoming scrap was tested with a magnet after being unloaded from rail cars onto a conveyer belt with hydraulic or rail cranes. * * * The incoming scrap was then spark tested by placing the scrap against a grinding wheel to produce a spark. The color of the spark identified the metal. Where those tests did not definitively identify the chemical composition, further testing was performed by placing acid on the scrap or on grindings resulting from drilling a hole in the metal.* * *

These tests would be sufficient to identify about 90 percent of the incoming scrap. For the remaining 10 percent * * *, the

scrap yards had laboratories equipped with x-ray spectrometers and atomic absorption analyzers to test tiny pieces of scrap called grindings obtained from drilling a hole in the scrap.* * *

Large and irregularly-shaped incoming scrap was compacted or crushed before being tested, which allowed for a composite piece * * * for testing. Incoming scrap was sometimes decontaminated or upgraded. Decontamination was the process of cleaning and cutting out sections of non-alloy material from the scrap metal and was performed by cutting with an automatic torch or an abrasive saw. Upgrading was the separating out of nonstainless steel material from mixed shipments of stainless and non-stainless steel scrap received by the * * * yards.* * *

After the * * * alloy content was identified the scrap was sorted into containers corresponding to its grade. There were hundreds of grades.* * *

25. Sizing was the operation of cutting scrap to a size that would fit in the steel mill's furnaces and depended upon the shape and size of each individual piece of scrap. Sizing includes cutting, crushing, ripping, shearing or shredding.* * * Cutting refers to the cutting of scrap into smaller pieces using an automatic torch. Ripping, which was rarely needed, is the term used to separate stainless steel from non-stainless material. Shearing is the cutting of long strips of scrap into smaller pieces using alligator or heavy shears. Shredding is the cutting of scrap in a shredder into small thin pieces and was occasionally performed on special kinds of incoming scrap. Larger pieces of scrap were put through a crusher to break up big pieces of castings which could not be cut by other methods and could also be subject to another method of cutting, such as shearing and/or cutting, depending upon * * * size.* * *

26. Packaging was the weighing and accumulating of truck loads or railcar loads of a specific grade of solids or a sufficient amount of briquettes or bales of turnings to comprise a railcar load or truck load, to fill a customer order. Briquetting is the forcing, by using a briquetting machine, of turnings and small solids into blocks no larger than 3 ft. by 5 ft. by 2 ft. for ease of transport and utilization in the customer's furnace. Baling is performed by compressing very thin scrap into small square sized packs for the convenience of handling, transporting and furnace size.

* * * * * * *

29. The truck loads and railcar loads of prepared scrap were then exported to foreign steel mills in order to be processed into stainless steel sheets, plates, and strips.

> The parties further agree in paragraph 14 of this stipulation that the crux of their controversy is whether or not the merchandise was "manufactured in the United States or subjected to a process of manufacture in the United States" within the meaning of TSUS item 806.30, *supra*, and that "[a]ll other conditions of [that] item * * * are met."

A

The imports underlying this action, as described in their entry papers and also in the foregoing stipulation, were stainless steel sheets, plates, and strips produced overseas. And those products were "manufactured" there within any definition of that term. That is, plaintiff's exported pieces of metal underwent transformation, resulting in new and different articles, having distinctive names, characters or uses of the kind contemplated by *Anheuser-Busch*, *supra*, and other cases. Nothing which occurred in the United States prior thereto, as stipulated above by the parties, amounted to such manufacture.

The plaintiff does not argue otherwise, but it does contend that the afore-described preparation of the scrap for shipment for that foreign transformation was itself manufacture—in this country. Its briefs characterize the incoming metal as "junk"[2], perhaps in the hope that this court could and therefore would divine transformation into scrap. The court cannot do so on the evidence adduced, although at least some sources of that metal surely could satisfy someone's definition of junk[3]. But that definition would not necessarily differ materially from that for scrap[4]. Whichever definition, the substance of interest which entered the Newmet yard(s) remained that substance upon exit for export, including some originally from other lands. In short, the court is unable to conclude that Newmet's preparation of the articles of metal for export was "manufacture[ ] in the United States" in satisfaction of the statutory standard to support, if not save, dissipating U.S. industry.

This action thus comes down to consideration of whether that preparation subjected those articles to a "process of manufacture in the United States". On this issue, the plaintiff argues that,

> in enacting item 806.30, TSUS, Congress did not intend the phrases "manufactured in the United States" and "subject to a process of manufacture in the United States" to mean the same.

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[2] Memorandum in Support of Plaintiff's Motion for Summary Judgment [hereinafter "Plaintiff's Memorandum"], pp. 1, 2, 7, 12, 15; Plaintiff's Memorandum in Reply, pp. 2, 7, 15, 19.

gap period in its final orders as evidenced by language in a concurrent investigation. *See, e.g., Notice of Antidumping Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products From Argentina and the Republic of South Africa*, 66 Fed. Reg. 48,242, 48,243 (Dep't Commerce September 19, 2001).

[4] *Compare, e.g., id. with id.* at 2039.

> A contrary conclusion would render the words of the statute superfluous, a result the courts seek to avoid.[5]

This court concurs. And the plaintiff also points out that

> "Congress used the expression 'subjected to a process of manufacture' as synonymous with processing." * * * "Processing generally connotes an advancement of the material or article, as distinguished from manufacturing which is broader in scope," said the Customs Service in Headquarters Ruling 055038 dated June 16, 1978. Thus, less has to be done to "process" an article than to "manufacture" one.[6]

Cited by counsel for the last proposition is *Firestone Tire & Rubber Co. v. United States*, *supra*, which does indeed support it. In that case, metal top and bottom domes for liquid containers were manufactured in the United States and then sent to Canada for coating with rubber before return to this country. The court held that application to be "further processing" under TSUS item 806.30, overruling the contrary view of Customs, which had resulted in imposition of duties on the full appraised value of the returned, rubberized, metal domes. That view of the government was that,

> to come within the purview of item 806.30, TSUS, some process of manufacture comparable to machining, grinding, drilling, tapping, threading, punching, or forming must be performed on the metal itself. Defendant urges that these enumerated operations were the types of "further processing" contemplated by Congress in item 806.30, and that the rubber coating operation performed by Uniroyal in Canada was not comparable to any of the above enumerated operations.

71 Cust.Ct. at 66, 364 F.Supp. at 1397. The court concluded that Congress had not intended this "highly restrictive interpretation" and that the process at bar was a "manufacturing operation performed by Uniroyal in [Canada]". *Id.*

The result of that operation in that case, however, was a genuine change or advancement in the character of the merchandise. This the plaintiff does not show herein. Whatever the processing of its goods, as stipulated above, the unaltered facts are that scraps of stainless steel entered the Newmet yard(s) and that scraps of stainless steel exited those premises. Ergo, the plaintiff is not entitled to the benefit of item 806.30, TSUS, *supra*.

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[5] Plaintiff's Memorandum, p. 11, citing *Carey & Skinner, Inc. v. United States*, 42 CCPA 86, C.A.D. 576 (1954).

[6] Plaintiff's Memorandum, pp. 11–12, erroneously attributing in toto the first quoted sentence to *A.F. Burstrom v. United States*, 44 CCPA 27, [31,] C.A.D. 631 (1956).

III

In view of the foregoing, plaintiff's motion for summary judgment must be denied; judgment for the defendant, dismissing this action, will enter accordingly.

(Slip Op. 03–101)

CORUS STAAL BV, AND CORUS STEEL USA INC. PLAINTIFFS, *v.* UNITED STATES DEPARTMENT OF COMMERCE DEFENDANTS, AND NATIONAL STEEL CORP., BETHLEHEM STEEL CORP., AND UNITED STATES STEEL CORP., DEFENDANT-INTERVENORS.

Consolidated Court No. 02–00003

[Antidumping Duty Determination Remanded]

(Dated: August 12, 2003)

Steptoe & Johnson LLP (Richard O. Cunningham, Joel D. Kaufman, and *Alice A. Kipel)* for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Paul D. Kovac*), for defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, John J. Mangan, James C. Hecht) for defendant-intervenors Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

OPINION

RESTANI, *Judge:* This consolidated matter is before the court following its decision in *Corus Staal BV v. United States*, 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003) ("*Corus I*"), in which the court remanded a single aspect of the final determination made by the United States Department of Commerce ("Commerce") in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 50,408 (Dep't Commerce Oct. 3, 2001), *as amended* by 66 Fed Reg. 55,637 (Dep't Commerce Nov. 2, 2001) ("*Final Determination*"). Familiarity with that decision is presumed. The sole remaining issue involves the appropriate period for collection of provisional measures.

BACKGROUND

Commerce issued its preliminary determination in this matter on May 3, 2001. *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 22,146 (Dep't Commerce May 3,

2001). Respondents Corus Staal BV and Corus Steel USA Inc. (collectively "Corus") subsequently requested an extension of the final determination pursuant to 19 C.F.R. § 353.210(b).[1] In its request, Corus agreed to an extension of provisional measures from a four-month period to not more than six months. *See* Corus' May 22, 2001 Letter to Commerce.[2] Commerce granted postponement and stated that it would issue its final determination by September 15, 2001. *Postponement of Final Determination for Antidumping Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 32,600 (Dep't Commerce June 15, 2001). Due to the events of September 11, the time-frame for issuing the determination was extended by four (4) days. Commerce published the final determination on October 3, 2001, and an amended final determination on November 2, 2001. *See Final Determination* and accompanying Issues and Decision Memorandum, *amended by* 66 Fed. Reg. 55,637 (Dep't Commerce November 2, 2001).

On November 15, 2001, the International Trade Commission ("ITC") notified Commerce of its affirmative material injury determination. *See Hot Rolled Steel Products From China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 66 Fed. Reg. 57,482 (November 15, 2001). Commerce published the antidumping order on November 29, 2001. *See Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (Dep't Commerce November 29, 2001).

In challenging the *Final Determination* before this court, Corus argued, *inter alia*, that provisional measures should not have been collected more than six months after the preliminary determination

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(a) Deposit of estimated antidumping duty under section 1673b(d)(1)(B) of this title

If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section 1673b(d)(1)(B) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 1673d(b) of this title is published shall be—

(1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or

(2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

Id.

[2] As explained in *Corus I*, the agreement for provisional measures was "required by regulation, 19 C.F.R. § 351.210(e)(2), and reflects the limitation on provisional measures set forth in 19 U.S.C. § 1673b(d) that prohibits the assessment of antidumping duties during the gap period after the expiration of the six month period until issuance of the order." *Corus I*, 259 F. Supp. 2d at 1272. Section 1673b(d) provides, in relevant part:

(d) Effect of determination by the administering authority. If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority [shall (1) order the posting of appropriate cash deposits and (2) order the suspension of liquidation.]

* * * * * * *

The instructions of the administering authority under paragraphs (1) and (2) may not remain in effect for more than 4 months, except that the administering authority may, at the request of exporters representing a significant proportion of exports of the subject merchandise, extend that 4-month period *to not more than 6 months*.

Id. (emphasis added). As a result, Commerce may not collect cash deposits, in this context, based upon the preliminary determination for more than six months. The period between the end of the six month period and the time that Commerce may resume collection of deposits based upon the final antidumping order is referred to as the "gap period."Commerce concedes that it is inappropriate to collect deposits during this gap period.

was issued on May 3, 2001. Commerce agreed[3] and requested remand to include appropriate language in the order. While both Commerce and Corus agreed that remand was in order, they disagreed as to the final date of collection of provisional measures, i.e. the start date of the gap period. Corus argued that, because Commerce had previously interpreted six (6)
months to equal 180 days, collection should have ended on October 30, 2001. Commerce responded that six months equals six calendar months and, therefore, collection should have ended on November 3, 2001—184 days in this case.

The court sustained Commerce's final determination in other regards but remanded the matter "*for the sole purpose* of revising its antidumping order to preclude collection of provisional measures beyond the six month period." *Corus I*, 259 F. Supp. 2d at 1273 (emphasis added). Because Commerce's standard method for calculating the provisional measures time period was unclear, the court ordered that, upon remand, Commerce explain its common practice "and revise the order consistent with that practice." *Id.* In short, the sole issue was whether Commerce normally interprets six months to equal 180 days or six calendar months.

In its remand results, Commerce agreed that its "practice with respect to our interpretation of 'six months' in the context of provisional measures * * * has not been consistent." *Remand Determination* at 2. Commerce, therefore, states that its "current practice is to interpret 'six months' as 180 days." *Id.* at 3.[4] Commerce explained that, if its redetermination is affirmed, Commerce "will revise the antidumping duty order to include the appropriate language lifting suspension of liquidation 180 days from the date of publication of the preliminary determination in the Federal Register," which in this case would be October 30, 2001.[5] *Id.* As would be expected, Corus agrees with Commerce's finding on that issue. *See Corus Objections to Remand Determination* at 2.

Commerce, however, has raised a new issue in its *Remand Determination*. Although the parties now agree on the proper start date for the gap period, Commerce has taken a new position as to the end date. Commerce argues that the gap period should end at the time the ITC's final injury determination is published, rather than on the date of publication of the antidumping duty order. Here, the ITC in-

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[3] Commerce admits that it failed to include customary language lifting the suspension of liquidation during the

[4] In addition to the cases cited by Corus, *see, e.g., Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Antidumping Duty Investigation of Low Enriched Uranium from France*, 67 Fed. Reg. 6,680 (Dep't Commerce February 13, 2002), Commerce acknowledges that it has also interpreted six months to equal 180 days in other cases. *See, e.g., Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945, 65,947 (Dep't Commerce October 29, 2002). As will be discussed, *see* discussion *infra* at 7, Commerce provided an explanation of why it considered this practice reasonable.

[5] Commerce points out that, although Corus contended that provisional measures should not be collected after October 30, 2001 (Corus Br. at 39), the proper instruction requires that provisional measures not be collected after October 29, 2001, because the collection of the provisional measures starts on the date of publication of the preliminary determination.

jury determination was published on November 15, 2001. The final antidumping duty order was published on November 29, 2001. In other words, Commerce argues that the gap period should run from October 30, 2001 to November 15, 2001 while Corus argues that the gap period should end on the date preceding the publication date of the antidumping duty order, November 28, 2001. With respect to Commerce's new position, Corus argues that (1) Commerce should be foreclosed from changing the end date at this late date under the "rule of mandate" and "law of the case doctrine"; and (2) that Commerce's proposed end date is otherwise erroneous and counter to its past practice.

DISCUSSION

I. Beginning of Gap Period

As discussed, the parties agree that the start date for the gap period should be October 30, 2001 (i.e., 180 days after May 3, 2001). Commerce suggests that its revised practice, calculating the gap period based upon days rather than calendar months, is reasonable for two reasons. First, Commerce contends that the practice is more in line with its regulation for countervailing duty investigations wherein the limit on the provisional measures time period is also set forth in days. *See* 19 C.F.R. 351.210(h) (providing for a 120-day period after the publication of the preliminary determination). Second, Commerce argues that time periods based upon days, rather than months, "provides consistency across all cases whereas the period covered within a six month time frame can vary or each case depending upon how many months within the six month period consists of 28, 30, or 31 days." *Remand Determination* at 3. The court agrees and finds no error in this regard.

II. End of the Gap Period

A. Rule of Mandate

As discussed, Commerce, for the first time, argues that the appropriate date to resume collection of cash deposits is the date that the ITC publishes its final affirmative injury determination. *Remand Determination* at 4. In briefing before this court, Commerce previously agreed with Corus that the end date related to the issuance of the final order[6] and at no time suggested that the end of the gap period was in doubt. Although there seems to be some confusion on the part of Commerce, there is no question that the sole issue on remand was the start date of the gap period (October 30, 2001 or November

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[6] In its brief in *Corus I*, Commerce stated:

> Commerce inadvertently excluded appropriate language from the antidumping order as published in the Federal Register that would lift the suspension of liquidation six months after the Preliminary Determination (i.e., November 3, 2001) and *before the issuance of the antidumping order (i.e. Novermber 28, 2001).*

Commerce Br. at 45–46 (emphasis added).

3, 2001). Corus argues that, because Commerce did not raise the issue before, it cannot do so now because it is bound by the limited remand instruction under the so-called "mandate rule."[7]

Under the mandate rule, a lower court[8] or agency[9] may consider a new issue on remand only if there is a showing that (1) controlling legal authority has changed dramatically; (2) significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light; or (3) that a blatant error in the prior decision will, if uncorrected, result in a "serious injustice." *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (quoting *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993)). Commerce has not argued that the controlling legal authority has changed and the "new evidence" exception is inapplicable in this circumstance. As such, Commerce may only adjust the end date of the gap period on remand if failure to previously do so was clear error. The court finds that it was not.

Although both Commerce and Corus cite various agency decisions to suggest that Commerce has previously acted in one way or the other with respect to defining the gap period, for the purposes of this case, the threshold issue is whether there was a clear error in the agency's initial determination that must now be corrected to avoid injustice. To establish clear error in this context, Commerce must show that equating the end date for the gap period with the publication date of the final antidumping order is contrary to the statutory or regulatory scheme.

Along those lines, Commerce argues that, because 19 U.S.C. § 1673f(a) (2002) provides that provisional measures shall be collected upon entries "before notice of the affirmative determination of the Commission under section 1673d(b) of this title," definitive duties are in place upon publication of the ITC's final affirmative injury determination. This is wrong for two reasons. First, this provision was not intended to define the time period for collection of provisional measures but, rather, explains how Commerce should treat the "difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order."[10] While there

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[7] In addition, Corus argues that Commerce was precluded from addressing the end date of the gap period under the "law of the case" doctrine, under which a court "should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). The law of the case rule is inapplicable here because the court did not decide the final date of the gap period, explicitly or implicitly.

[8] A lower court generally is bound by the appellate court's decree and "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255(1895); *see also Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948) (finding that the lower court "has no power or authority to deviate from the mandate issued by [this Court].").

[9] "Although primarily applicable between courts of different levels, the [law of the case] doctrine and the mandate rule apply to judicial review of administrative decisions, and 'require[ ] the administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart.'" *Grigsby v. Barnhart*, 294 F.3d 1215, 1218 (10th Cir. 2002) (quoting *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998)).

[10] 19 U.S.C. § 1673f(a) reads:
Treatment of difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order

may be some other applicable provision, Commerce has not cited it. Second, that provisional measures are collected only before the ITC determination does not mean that the ITC determination triggers the collection of final duties. As such, setting the end of the gap period to coincide with publication of the final order does not conflict directly with the statute.[11] Because collecting deposits upon publication of the final order is not clearly contrary to the statute, the court cannot find that Commerce committed clear error by acquiescing in Corus' position that the gap period should have ended on November 28.

This conclusion is further supported by the fact that Commerce has itself previously found that the gap period ends on the date preceding publication of the final antidumping duty order. In *Low Enriched Uranium from France*, Commerce concluded that

> Section 733(d) states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months, unless exporters representing a significant proportion of exports of the subject merchandise request that the period be extended to not more than 6 months. As noted in the preliminary determination (66 FR 36743), the respondent made such a request on July 2, 2001. Therefore, entries of low enriched uranium made on or after January 9, 2002, and *prior to the date of publication of this order in the Federal Register*, are not liable for the assessment of antidumping duties due to the Department's discontinuation, effective January 9, 2002, of the suspension of liquidation.

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Low Enriched Uranium From France, 67 Fed. Reg. 6680, 6681 (Dep't Commerce Feb. 13, 2002) (emphasis added); *see also Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945, 65947 (Dep't Commerce Oct. 29, 2002) (finding that no duties should be assessed on subject entries during the start of the gap period and "the day preceding the date of publication of this notice [the final antidumping duty order] in the Federal Register.").[12] The court does not decide whether the gap period generally should end on the publication date of the ITC injury determination or the publication date of

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[11] For the same reason, there is no problem under the related regulation, 19 C.F.R. § 351.212(d).

[12] The court finds it curious that, although Corus pointed to 19 C.F.R. 351.210(h), which addresses the collection of provisional measures in countervailing duty cases, as a comparator to support defining the period for collection of provisional measures in days rather than months, *see* discussion *supra* at 6–7, Commerce does not acknowledge the obvious importance of the final order in that context. The regulation provides that:

> If the Secretary postpones a final countervailing duty determination, the Secretary will end any suspension of liquidation ordered in the preliminary determination not later than 120 days after the date of publication of the preliminary determination, *and will not resume it unless and until the Secretary publishes a countervailing duty order*.

Id. (emphasis added).

the final antidumping duty order. Rather, the court finds that Commerce has not shown the clear error required to raise this new issue following the court's limited remand instruction in the initial challenge.

CONCLUSION

For the foregoing reasons, the court sustains that portion of Commerce's *Remand Determination* agreeing that the provisional measures should not have been collected more than 180 days after the preliminary determination (i.e. not after October 29, 2001). The court reverses that portion of the *Remand Determination* in which Commerce now seeks to define the end date for the gap period as November 15, 2001. The court orders Commerce to revise its determination within 20 days hereof to reflect the last day of the gap period as November 28, 2001 and to advise the court of its issuance so that judgment may be entered.

(Slip Op. 03–102)

CEMEX, S.A., PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT AND NATIONAL CEMENT COMPANY OF CALIFORNIA, DEFENDANT-INTERVENORS AND CROSS-PLAINTIFFS

Consol. Court No. 93–10–00659

[Motion to enforce judgment denied.]

(Dated: August 12, 2003)

Manatt, Phelps & Phillips (Irwin P. Altschuler, Jeffrey S. Neeley and *Donald S. Stein)* for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director Commercial Litigation Branch, Civil Division, United States Department of Justice *(David S. Silverbrand), Edward N. Maurer*, Deputy Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, for defendant.

King & Spalding, LLP, (Joseph W. Dorn, Michael P. Mabile and *Jeffrey M. Telep)* for defendant-intervenors and cross-plaintiffs.

OPINION

RESTANI, *Judge:* This matter is before the court on the motion of the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement and National Cement Company of California (collectively "Ad Hoc") to enforce the judgment entered in this matter against Plaintiff Cemex, S.A. ("Cemex"), a Mexican exporter of gray portland

cement. Ad Hoc represents domestic producers who succeeded in this matter in obtaining increases in the calculation of antidumping duties over the amount originally calculated by the Department of Commerce ("Commerce") for the second administrative review period, August 1, 1991, to July 31, 1992. *See Cemex, S.A. v. United States*, 20 CIT 1272 (1996), *aff'd*, 133 F.3d 897 (Fed. Cir. 1998). Various entries[1] were deemed liquidated as entered at rates under 60%, instead of at the antidumping duty rate sustained by the courts, which was over 106%. Cemex and the United States assert that deemed liquidation under 19 U.S.C. § 1504(d) is proper, as Customs[2] did not liquidate the entries within six months of receiving notice of the lifting of the suspension of liquidation from Commerce.

BACKGROUND

In this case, as has happened in many others, *see, e.g., NEC Solutions (America), Inc. v. United States*, No. 01–00147, slip op. 03–80 at 12 n.15 (Ct. Int'l Trade July 9, 2003) ("*NEC*"), after the mandate of the Federal Circuit issued on March 2, 1998, no notice of the amended final results was published. However, unlike certain other matters, liquidation instructions were promptly issued from Commerce to Customs. The instructions were posted on Customs' internal use only electronic bulletin board. As indicated, Customs did not act timely, and, pursuant to Customs Headquarters directions for the 140 Nogales entries, public bulletin notice of "no change" or "deemed" liquidation was posted on April 6, 2001. The one "lost" El Paso entry was posted as a "no change" entry on March 14, 2003. The one "lost" Los Angeles entry has not yet been posted as a "deemed" or "no change" liquidation.[3]

Although Ad Hoc alleges it is merely pursuing its rights to have the proper competition equalizing duties imposed, apparently it is also motivated by the Continued Dumping and Subsidies Offset Act of 2000, Pub. L. 106–387 (19 U.S.C. § 1675(c)) ("Byrd Amendment"). Under the Byrd Amendment, producers with qualifying expenditures for a particular year may obtain a share of the antidumping duties collected by Customs for that year.

In 2001, when the deemed liquidated duties were collected, at least one producer made a claim for Byrd Amendment moneys and received them. These movants, or the producers they represent here, did not. Nor did they immediately object to the "no change" or "deemed" liquidation at Nogales, which was posted publicly.[4] There

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[1] To wit: 140 entries at Nogales, one entry at El Paso, and one entry at Los Angeles (not yet posted as liquidated)

[2] The then United States Customs Service is now known as the Bureau of Customs and Border Patrol of the Department of Homeland Security.

[3] In the case of increases occasioned by court review, "no change" or "deemed" liquidation signals that the earlier lower rate is assessed.

[4] Ad Hoc, in fact, has sought expedited disposition of this matter in an attempt to have collection made prior to

is no statutory provision for domestic producers to "protest" a liquidation under 19 U.S.C. § 1514, as importers may. Exactly what measures Ad Hoc should have taken is not clear, but Cemex asserts that because liquidations are final as to "all persons" if no protest is filed within ninety days of liquidation, failing to take some action within 90 days of the Nogales liquidation terminated Ad Hoc's rights. *See* 19 U.S.C. §§ 1514(a) and (c).

Disposition on such a basis will not dispose of the El Paso entry, which was liquidated less than 90 days before this action was filed, or the Los Angeles entry which remains unliquidated. Thus, the court turns to the central deemed liquidation issue.

DISCUSSION

Determining whether the entries are deemed liquidated involves first determining what version of 19 U.S.C. § 1504(d) applies. If, under the applicable version, deemed liquidation occurs if Customs does not liquidate the entries within six months of the receipt by Customs of notice of the end of suspension of liquidation, then the court must decide if the proper notice was given.

Ad Hoc's position that deemed liquidation is improper rests on the applicability of pre-1993 versions of 19 U.S.C. § 1504(d). Section 1504 was originally enacted in 1978 to apply to post April 1, 1979 entries. Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, § 209(b), 92 Stat. 888, 905 (1978). The purpose of the provision was to give importers finality as to their duty obligations by providing for deemed liquidation at the rate claimed by the importers, unless actual liquidation occurred within specified time limits. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002) ("*Int'l Trading*");[5] *see also United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1559 (Fed. Cir. 1997) ("The 'deemed liquidated' provision of section 1504 was added to the customs laws in 1978 to place a limit on the period within which importers and sureties would be subject to the prospect of liability for a customs entry."). Under this earlier version of § 1504(d), generally deemed liquidation would occur within one year of entry or within four years if suspension intervened. If liquidation continued to be suspended beyond the four year limit, liquidation was to occur within 90 days of the removal of suspension.

September 30, 2003, so that certain domestic producers may make claims for qualifying expenditures for this year.

[5] In *Int'l Trading*, the Court of Appeals explained:

> Before section 1504 was enacted, there was no statutory restriction on the length of time Customs could take to liquidate an entry. *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993). "Customs could delay liquidation as long as it pleased, with or without giving notice." *Int'l Cargo & Surety Ins. Co. v. United States*, 779 F.Supp. 174, 177 (Ct. Int'l Trade 1991). In 1978, Congress enacted section 1504 to impose a four-year time limit for liquidation. The primary purpose of section 1504 was to "increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction." *Dal-Tile Corp. v. United States*, 829 F. Supp. 394, 399 (Ct. Int'l Trade 1993) (internal quotations and citation omitted).

281 F.3d at 1272.

In *Canadian Fur Trappers Corp. v. United States*, 12 CIT 612, 615, 691 F. Supp. 364, 367 (1988), *aff'd*, 884 F.2d 563 (Fed. Cir. 1989), however, the 90-day period was found to be directory rather than mandatory, so that entries, the liquidation of which was suspended for more than four years, were not subject to deemed liquidation. Unfortunately for Ad Hoc, the statute was again amended in 1993. The 1993 amendment became effective on December 8, 1993, without a limitation to entries made after that date, and it provides for deemed liquidation if liquidation does not occur within six months of Customs receipt of notice of the removal of suspension. Pub. L. No. 103–182, 107 Stat. 2057, 2219, § 641(1)(A).[6]

Ad Hoc argues, however, that application of the 1993 amendment would be a retroactive application of a statute to 1991–1992 entries, where the intent to apply the statute retroactivity has not been made clear by Congress. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (retroactive affect only if clear congressional intent). It is somewhat difficult to determine what is a retroactive application where unliquidated entries are at issue, and suspension was in effect when the statute was enacted. *American Permac, Inc. v. United States* provides some guidance on this issue. 191 F.3d 1380 (Fed. Cir. 1999). In that case, the six months deemed liquidation provisions were found to effect an improper amendment when the time period had already expired before the law was enacted. *Id.* at 1382. Here the liquidation periods had not run and there were no settled expectations as to deemed liquidation as to the entries at issue here. As applied here, the 1993 act does not impair vested rights, increase liability for past conduct, or impose new duties in the broad sense. *See Landgraf*, 511 U.S. at 280. Thus, it is proper to assume that Congress' unlimited effective date applies and the application of the 1993 statute is not a retroactive application.

Ad Hoc alternatively relies on the 1994 amendments, which may provide different remedies other than deemed liquidation, or in addition to deemed liquidation, an issue which the court does not decide. The 1994 amendments, however, apply to post January 1, 1995, administrative reviews. Pub. L. No. 103–465 § 291. They are not applicable. Ad Hoc also relies on the addition of the 1996 amendments, which are effective as of December 8, 1993. Pub. L. No. 104–295 § 3(b). Those amendments, however, did not eliminate deemed liquidation.

Under the 1993 amendment, the next issue is whether Customs received notice of the removal of suspension of liquidation so as to trigger the six-month deemed liquidation period. The liquidation instructions of March 23, 1998, clearly state that they "constitute the

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[6] The 1984 amendment, effective as to post November 14, 1984 entries, Pub. L. No. 98–573, § 195(a), 98 Stat 2948, 2974 (1984), did not alter the basic scheme. Ad Hoc argues that somehow the effective date language of the 1984 amendments indicates that the pre-1993 version continued to apply post-1993. The court rejects this argument.

immediate lifting of suspension." The notice, however, was not a public notice and, in fact, suspension had not yet been lifted.

Fujitsu General America, Inc. v. United States states that suspension does not end until the period for seeking writ of certiorari has expired. 283 F.3d 1364, 1379 (Fed. Cir. 2002) ("*Fujitsu*"). The Judgment of the Federal Circuit herein was entered on January 8, 1998, and the parties had ninety days under 28 U.S.C. § 2101(c), or until April 8, 1998, to file for a writ of certiorari. Because the time for appeal had not yet expired, suspension of liquidation had not been lifted when Customs issued the March 23, 1998 instructions. Further, both *Fujitsu* and *International Trading* endorse the concept that the notice should be both unambiguous and public. Of course, in those cases there were public Federal Register notices. Here, no such notice was posted. The court has recently held in *NEC* that an unambiguous public notice other than the Federal Register notice will suffice to trigger deemed liquidation under the 1993 amendment. Here, the March 23, 1998 notice was not public, and it cannot be said to be unambiguous where the suspension had not yet been lifted. Some other event might suffice to cure this notice so as to trigger the six-month period, but the parties have not brought it to the court's attention. The court does not decide whether, post-suspension removal, specific and clear suspension removal notice via liquidation instructions will suffice, even if the instructions are not made public, but alone the March 23, 1998 notice does not qualify.[7]

As proper deemed liquidation has not been established for any of the entries, the court turns to the issue of just what remedies may be available to Ad Hoc. As indicated, 19 U.S.C. § 1504(d) was meant to benefit importers. Therefore, it fits neatly into the Customs protest of liquidation scheme. If a deemed liquidation or any liquidation is adverse to an importer, it has its protest remedies under 19 U.S.C. § 1514 and access to judicial review under 28 U.S.C. § 1581(a). Domestic parties have no specific avenue of relief for improper liquidation.[8] The Byrd Amendment might have been accompanied with a new administrative remedy provision for domestic parties, but it was not. As to the Nogales entries, which were liquidated in 2001, 19 U.S.C. § 1514(a) bars Ad Hoc's claim because the liquidation became final as to "all persons" after 90 days passed. 19 U.S.C. § 1514(a).

19 U.S.C. § 1514 developed piecemeal, but the finality provision of 19 U.S.C. § 1514(a) is not obviated by the provisions of 19 U.S.C. § 1514(b), which suspend finality of liquidation if actions are filed challenging antidumping duty determinations. Section 1514(b) was enacted pursuant to the Trade Agreements Act of 1979, Pub. L. No.

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[7] The court is aware that deemed liquidation defeats the direction of 19 U.S.C. § 1516a(e) (requiring liquidation in accordance with the final court decision), but that is the effect of the deemed liquidation provision. This is not the reason for the court's finding of no deemed liquidation.

[8] Domestic parties have been given certain rights to challenge classification and rate of duty decisions, but the remedies are prospective. *See* 19 U.S.C. § 1516.

96–39, 93 Stat. 144 (1979), which was before the court had equitable power to enjoin liquidation; today it seems somewhat redundant. There is no legislative history to guide the court. Section 1514(b) does seem, however, to assist the statutory goal of not requiring parties to proceed on multiple fronts. Rather, they are to challenge substantive antidumping duty determinations before Commerce or the International Trade Commission, as appropriate, with judicial review rights as to adverse determinations. *See Sandvik Steel Company v. United States*, 164 F.3d 596, 600–02 (Fed. Cir. 1998). Here, there are no pending proceedings and nothing in § 1514(b) indicates it prevents finality as to Customs' determinations after court proceedings are conclusively terminated. Otherwise, there would never be finality, which is clearly contrary to legislative intent.

Unlike the automatic liquidations in *L.G. Electronic U.S.A., Inc. v. United States*, 21 CIT 1421, 1431, 991 F. Supp. 668, 677 (1997), which were barred by a court injunction and which the court declined to recognize, here there was no longer a court injunction in effect and the posted liquidations were purposeful. *See also Yancheng Baolong Biochemical Company, Ltd. v. United States*, No. 01–00338, slip op. 03–84 at 12 (Ct. Int'l Trade July 16, 2003) (no protest required of liquidations in violation of court order.). Customs made a decision to recognize deemed liquidations and to post them. It is Customs' decision to declare deemed liquidation, not that of any other agency, which is at issue. Assuming Ad Hoc had any rights to prevent finality, under these circumstances it would have had to act within 90 days of the posting of notice of liquidation to avoid the effects of 19 U.S.C. § 1514(a).

Further, by waiting beyond the 2001 collection year Ad Hoc seeks to disrupt the Byrd Amendment distribution scheme. Was the lone 2001 claimant entitled to a different distribution? Is Ad Hoc entitled to complain about funds it wants collected in 2003 when the funds should have been collected in 1998 or, at the latest, 2001? Even if 19 U.S.C. § 1514(a) does not bar Ad Hoc, it waited too long as to the Nogales entries.[9] Parties to unfair trade litigation should not have to police the Commerce Department, but without having filed a Byrd Amendment claim to 2001 collections, Ad Hoc is not in a position to complain about an erroneous liquidation in that year. For purposes of the Byrd Amendment, it was not harmed by incorrect 2001 deemed liquidations. Even if it technically is harmed by the liquidations because it lost the ordinary competitive advantages resulting from the antidumping proceedings, those advantages were temporary and tangential. Ad Hoc should have pursued whatever remedies it had to enforce the judgment here promptly. Enforcement at this

[9] Because Ad Hoc has no remedies as to the Nogales entries, the court need not allow further attempts by Cemex or the United States to establish deemed liquidation as to those entries.

date would prejudice other parties by disrupting finality and the Byrd Amendment distribution scheme.

The court has not determined what relief, if any, is available as to the one El Paso entry for which liquidation was posted within the 90 days prior to this action, or for the Los Angeles entry which remains unliquidated. The parties are to consult. If the parties agree as to reliquidation, or if reliquidation as to these entries is not to be pursued, the court will enter an order denying Ad Hoc's motion so that it may pursue its appellate rights, if it chooses.[10] If the dispute is to continue, Cemex and the United States have eleven (11) days to explain these positions as to those entries, applying this decision. Ad Hoc has seven (7) days to respond.

(Slip Op. 03–103)

LIBAS, LTD., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 95–00014

[Upon remand, Plaintiff is awarded attorneys' fees and costs under the Equal Access to Justice Act.]

(Dated: August 13, 2003)

Law Offices of Elon A. Pollack (Elon A. Pollack and *Eugene P. Sands)* for plaintiff.
Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, *Bruce N. Stratvert*, Attorney, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Edward Maurer*, Office of Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, Of Counsel, for defendant.

OPINION

This case concerns Plaintiff Libas, Ltd.'s ("Libas") claim for attorneys' fees and costs from Defendant United States pursuant to 28 U.S.C. § 2412(d), the Equal Access to Justice Act ("EAJA"). Libas brought the original action to challenge a United States Customs Service[1] ("Customs") classification of fabric imported by Libas from India. Familiarity with the history of the original case is presumed. *See Libas, Ltd. v. United States*, 24 CIT 893, 118 F. Supp. 2d 1233 (2000), *Libas, Ltd. v. United States*, 193 F.3d 1361 (Fed. Cir. 1999),

[10] The parties are also to advise if Cemex' motion to strike the Rule 26(f) report is now moot.

[1] The United States Customs Service has since become the Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

[2] Libas's petition for attorneys' fees and costs was unopposed because the Court refused to accept Customs' untimely submission of its brief in opposition to Libas's motion.

Libas, Ltd. v. United States, 20 CIT 1215 (1996). This Court previously denied Libas's petition for attorneys' fees and other expenses. *Order Denying Plaintiff's Application for Attorneys' Fees and Other Expenses under the Equal Access to Justice Act* (May 16, 2001). On January 7, 2003, the Court of Appeals for the Federal Circuit vacated the denial and remanded to this Court for further proceedings. *Libas, Ltd. v. United States*, 314 F.3d 1362, 1366 (Fed. Cir. 2003).[2] Upon remand, the Court holds that the United States was not substantially justified in the classification determination. Further, Libas is entitled to attorneys' fees, and can recover those fees in excess of the $75 per hour base provided by the EAJA. However, not all fees and expenses sought by Libas are recoverable.

I. Customs was not substantially justified in its classification of the fabric

28 U.S.C. § 2412(d)(1)(A) reads, in part: "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (2000) (emphasis added). The Supreme Court has defined substantial justification as "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). This has been interpreted as requiring the United States to "show that it was *clearly* reasonable in asserting its position * * * in view of the law and the facts." *Gavette v. Office of Personal Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (emphasis in original). Therefore, the burden of proving either substantial justification or special circumstances lies with the United States. *Traveler Trading Co. v. Untied States*, 13 CIT 380, 381, 713 F. Supp. 409, 411 (1989) ("Should the government be unable to bear this burden, the court must award fees and expenses."). In addition, the United States' position must be substantially justified not only in litigation, but at the administrative level as well. *Gavette*, 808 F.2d at 1467.

To be substantially justified, the United States' position is not required to be correct, as long as it is reasonably based. *Pierce*, 487 U.S. at 566, *Consolidated Int'l Automotive, Inc., v. United States*, 16 CIT 692, 696, 797 F. Supp. 1007, 1011 (1992). In *Consolidated*, for example, incorrect calculations of the foreign market value for chrome-plated lug nuts from the People's Republic of China were deemed substantially justified because Commerce was adopting a novel methodology for determining the market value of goods in a non-market economy. 16 CIT at 697, 797 F. Supp. at 1012. However, when the United States offers " 'no plausible defense, explanation, or substantiation for its action,' " its position is not reasonably based. *Consolidated*, 16 CIT at 696, 797 F. Supp. at 1011 (quoting *Griffin &*

Dickenson v. United States, 21 Cl.Ct. 1, 6–7 (1990)), *see also Beta Systems, Inc. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989) (when "[n]o authority for [its] position is offered by the government * * * ", its position is not substantially justified) (quoting *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1182 (Fed. Cir. 1988)).

The only authority cited by Customs in the previous *Libas* case was its own test to distinguish between hand-loomed and power-loomed fabric. Because of severe deficiencies in Customs' fabric test for distinguishing between hand-loomed and power-loomed fabric, and the flawed procedure it used to arrive at that fabric test, Customs' incorrect categorization of Libas's fabric as power-loomed was not substantially justified. The test was so scientifically unsupportable that it was tantamount to offering no authority at all. In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court set forth certain factors to consider when determining the reliability of a scientific test: (1) whether the technique in question has been tested; (2) whether the test has been published or otherwise evaluated by peers; (3) the tests' known or potential rate of error; and (4) whether the test has been generally accepted. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593–94 (1993). The previous *Libas* opinion delivered by the Court detailed how Customs' testing method failed to meet any of the *Daubert* factors. *Libas*, 188 F. Supp. 2d. at 1235–1237.

Customs' failure to meet the first *Daubert* factor, whether the test itself has been scrutinized, is the most relevant hindrance to its claim of substantial justification. In *Consolidated*, although no *Daubert*-like analysis was employed, the court was sympathetic to the United States' "erroneous" conclusions because Commerce was dealing with complex, "previously unaddressed issues." *Consolidated*, 16 CIT at 697. Although there is testimony which indicates that distinguishing between hand and power-loomed fabric is also troublesome, such testing is clearly distinguishable from *Consolidated*. In *Consolidated*, Commerce was trying to determine an inherently intricate and imprecise figure: the foreign market value of goods in a non-market economy. Commerce was aware that a degree of error was to be expected; their test was one in a series of attempts by the United States to foster more accurate valuations.

On the other hand, in the instant case, the fabric test can be effectively scrutinized. Either the fabric was hand or machine-woven; the goal is not estimation or approximation as in *Consolidated*. Therefore, although it may not be more reasonable to expect a more exact testing method than in *Consolidated*, it is reasonable to expect an understanding by Customs of the accuracy of its fabric test. This could have been achieved through double-blind testing: evaluating whether examiners, not previously informed of a sample's composition, could reliably distinguish hand and machine woven fabric by using Customs' fabric test. Instead, Customs' evaluation involved ex-

aminers who already knew of the material's composition, obviously an inappropriate testing method. *Libas*, 24 CIT at 896, 118 F. Supp. 2d at 1236. Reliance on such a fabric test was unreasonable at the administrative level. Customs failed to recognize the scientific unreliability of using the fabric test without any type of testing to validate the fabric test. It was also unreasonable in litigation because Customs should have been aware of the *Daubert* analysis to which any scientific test would be subjected.

In light of the fact that Customs' fabric test is not in accordance with *Daubert*, yet another roadblock to Customs' substantially justified argument is Customs' evident failure to appropriately consider the testimony of S. Ponnuswamy and Mary Jane Leland. Ponnuswamy, partner of JLC International of Madras, India, previously testified that JLC purchased the fabric at issue from hand-weavers in Kovur, India, and that he observed similar fabric being handwoven. *Libas*, 24 CIT at 898, 118 F. Supp. 2d at 1237. Leland, a Professor Emeritus at California State University at Long Beach, testified that the fabric is "typical of fabric produced on a hand-powered fly shuttle loom in the Madras area of India." *Id.* The Court of Appeals for the Eighth Circuit has held, "the government's position [cannot] be deemed reasonable in fact when it relied on an isolated part of the evidence and ignored other overwhelming evidence * * *." *Cornelia v. Schweiker*, 728 F.2d 978, 984 (8th Cir. 1984), *see also John Doe v. United States*, 16 Cl.Ct. 412, 420 (1989) ("Absence of thorough familiarity with the facts and the implications of those facts * * * is unreasonable."). Ponnuswamy and Leland's testimony may not have been "overwhelming" in the face of a validated, accurate Customs' fabric test. However, their testimony, along with the inherent weakness of Customs' test, lends itself to the conclusion that Customs was not substantially justified.

II. Amount of Attorneys' Fees to be Awarded Per Hour

28 U.S.C. § 2412 (d)(1)(D)(2)(A)(ii) (2000) provides that: "attorney fees shall not be awarded in excess of $125 per hour, unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The $125 base, however, was the result of a 1996 amendment to the EAJA; for cases initiated before March 29, 1996, the base award is $75. *See* Contract with America Advancement Act of 1996, Pub.L. 104–121. Since the original *Libas* suit was initiated in January of 1996, the lower figure applies to the instant case.

The Supreme Court in *Pierce* held that " * * * the exception for 'limited availability of qualified attorneys for the proceedings involved' must refer to attorneys 'qualified for the proceedings' in some specialized sense, rather than just their legal competence. We think it refers to attorneys having some distinctive knowledge or special-

ized skill needful for the litigation in question * * * " *Pierce*, 487 U.S. at 572. In this case, it is apparent that elevated attorneys' fees are appropriate. Although cases involving customs law are not automatically worthy of elevated attorneys' fees, in this case specialized skills in customs law were necessary for the instant case, and Libas produced affidavits that there was a shortage of lawyers in the Los Angeles area capable of handling like cases.

Theoretically, any legal practice area can be labeled as a "specialized skill" within the *Pierce* definition. However, such an expansive view, "would serve to emasculate the effectiveness of the $75 cap * * * " *Esprit Corp., Inc. v. United States*, 15 Cl.Ct. 491, 494 (1988). Instead, courts have read *Pierce* as attempting to curtail a broad interpretation. *Cox Construction Co. v. United States*, 17 Cl.Ct 29, 36 (1989) (" * * * Pierce's choice of 'patent law' as an example of a specialty probably indicates an intent to be more restrictive in its interpretation of 'limited availability of qualified attorneys."). As such, needing general expertise in a specific field, by itself, is insufficient for an award of attorneys' fees above the $75 base. *See Lozon v. Commissioner of Internal Revenue*, 1997 Tax Ct. Memo LEXIS 622, at 16. Therefore, in the case at hand, although Libas's credentials and expertise are undisputed, that alone will not affect the amount of attorneys' fees.

Beyond simply possessing expertise, "the test seems to be whether the specialized skills are required to competently litigate the case." *Esprit*, 15 Cl.Ct. at 494. If that is the case, attorneys' fees above $75 may be awarded. *Nakamura v. Heinrich*, 17 CIT 119, 121 (1993) (attorney's knowledge of customs law, applied in a broker license case, led to additional fees being awarded). In this case, as in *Nakamura*, the attorney's knowledge of customs law was necessary to litigate this case. Therefore, the Court will award fees above the statutory $75 minimum.

Of interest to courts in determining whether to consider higher lawyer's fees is the availability of regional lawyers who can litigate the case at hand. *Nakamura v. Heinrich*, 17 CIT at 121. ("The Court takes judicial notice of the relatively small Customs bar that practices before this Court * * * "). Libas submitted affidavits of attorneys from the Los Angeles area who stated that the customs bar was very small in that area. Therefore, the Court will award Libas fees of $125 per hour. The Court declines to award the excessive fees claimed by Libas, up to $260 an hour, because those were calculated based on the $125 statutory minimum which does not apply in this case.

III. Totals Attorneys' Fees and Expenses Awarded

Before proceeding, it is important to note that the burden is on the party seeking fees to detail with a degree of specificity the hours sought, and the activities conducted during those hours. As stated in

Esprit, "[a] party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the title expended, the nature and the need for the service, and the reasonable fee to be allowed." *Esprit Corp.*, 15 Cl.Ct. at 494. Failure to meet these minimal standards of specificity may result in a forfeiture of the claim for additional fees. *See Lozon*, 1997 Tax Ct., at *22 (fees not awarded for hours which there was "no detailed explanation of the services provided * * * "), *Bonanza Trucking Corp. v. United States*, 11 CIT 436, 443, 664 F. Supp. 1453, 1458 ("When fees are sought at the expense of a losing party in court, no amount of work, or money claimed therefore, is too small to obviate explanation.").

A. Attorneys' fees

Section 2412 applies only to "civil actions." 28 U.S.C. § 2412(a)(1). It is well grounded that attorneys' fees apply only to the proceedings surrounding the action at hand, *Gavette*, 808 F.2d at 1461, *Cox Construction*, 17 Cl.Ct at 36. Thus, fees and expenses that predate the summons and complaint, including those amassed at the administrative level, are not recoverable. *Traveler Trading Co.*, 13 CIT at 385. Hence, any hours billed before December 30, 1994, the date Libas's administrative protest was denied, shall be excluded from the total award.

Libas lists two employees, "JS" and "TP," in the invoices regarding billable hours.[3] Yet the amount of money sought for both is considerably lower that of the other attorneys listed. Furthermore, TP was given research assignments similar to those given to a summer associate or other non-attorneys. Since the Court has no detailed description is provided for either JS or TP, the Court is left to assume that they are law clerks, summer associates, or some sort of consultants. Since we have no information that establishes any of these employees as members of the bar, they do not fall within the parameters of the $75 minimum. *Bonanza*, 11 CIT at 444. Courts have come up with several different solutions for dealing with like situations, ranging from (1) awarding the amount paid to the employee by the law firm, (2) awarding the amount that the client was billed, or (3) awarding no payment at all. *Id.* The situation presented in this case is analogous to *Esprit*, where fees sought for a consultant were decreased by two thirds, centrally because no description of the consultant's importance to the trial was provided. Therefore, as in *Esprit*, we grant Libas one third of the requested for fees from TP's services. *Esprit*, 15 Cl.Ct. at 494.

Three invoices from the Law Offices of Elon A. Pollack to its client, Libas, were presented to the Court to substantiate Libas's claims for attorneys' fees. Invoice #5932 covered attorneys' fees from December

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[3] Although the rates for JS and TP are quoted for the Court's benefit, only the hourly rate for TP is relevant. JS accumulated no hours preparing for litigation.

8, 1994, to June 24, 1996. The total hours claimed in Invoice #5932 are 688.29, for a total of $148,767.90 in attorneys' fees. The Court has modified those totals. First, 28.5 hours of pre-litigation work (prior to December 30, 1994) were subtracted from the total, resulting in a total of 659.79 hours. Second, instead of the claimed hourly rates varying from $175 to $250, the hourly rates were all adjusted to $125. Therefore, Libas is awarded $82,473.75 for attorneys' fees under Invoice #5932.

Invoice #4264 covered attorneys' fees from July 8, 1996, to October 14, 1999, and claimed 521.04 hours for a total bill of $105,371.98. The Court subtracted from the total claimed hours 25.5 hours for work on drafting complaints for other cases before the Court of International Trade, and work on other protests before Customs. *See, e.g.*, Invoice #4264, on 4/3/97, "Edit complaint in case No. 95–10–01320" (claiming attorneys' fees for work on another case). Again, adjusting the attorneys' fees downward to $125, the Court awards Libas $61,942.50 for Invoice #4264.

Invoice #5934 covered attorneys' fees from December 8, 1999, to November 17, 2000, and also included $750.00 for an administrative charge to compile time records. The total bill was for 250.50 hours, or $60,591.25. The Court subtracted eight hours for work on other matters, such as "Review case files re Reserve Calendar" on December 17, 1999. The Court also subtracted seventeen hours by "tp". The result is 225.5 attorney hours, or $28,187.50 in attorneys' fees. After adding in the $481.67 for tp's work (17 hours × $85 per hour, reduced by twothirds), and the $750.00 for compiling the time records, the Court awards $29,419.17 in attorneys' fees for Invoice #5934.

B. Expenses

"The EAJA permits recovery of all reasonable and necessary expenses incurred or paid in preparation for trial of the specific case before court, which are customarily charged to the client." *Traveler Trading Co.*, 13 CIT at 386. However, several of the expenses sought by Libas are neither "reasonable" nor "necessary." First, plaintiff seeks reimbursement for numerous uses of "Federal Express" and messenger services without explaining why those services were necessary. As other courts have held, we find that costs for Federal Express and messenger services are not reimbursable, without an explanation as to why the United States Postal Service was inadequate. *Lozon*, 1997 Tax Ct., at *23. Second, plaintiff seeks awards for several vaguely described "meals." The Court does recognize Libas's need for sustenance, however we see no reason to allow remuneration for an expensive palate. Thus, meals at House of Shish Kabob for $115.00 on June 23, 2000, and Yang Chow Restaurant for $109.16 on June 4, 1996 shall not be remitted. Additionally, the meal claimed on July 26, 1996, at Brewski's for $33.78 is not permitted because no corresponding attorney hours or other expenses were

billed out that date. The Court cannot attribute that meal as necessary to perform any service for the client. Perhaps these meals were necessary group meetings; however, without any detail of the company or of the subject matter discussed, the expenses claimed fail Libas's burden of proof.

Third, plaintiff seeks payment for a stay at Doubletree Hotels on May 30, 1996. Claims for hotel costs, without explanation, have been denied in the past. *John Doe*, 16 Cl.Ct. at 422. Although this expense took place around the time of trial, we are given no explanation regarding its necessity. Failure to overcome Plaintiff's burden of proof, plus the Court's confusion as to why accommodations were necessary for a locally held trial, supports a denial for additional fees.

Fourth, plaintiff seeks payment for certain expenses incurred prior to December 30, 1994, the date when litigation began for purposes of calculating fees and expenses. Therefore, the Court subtracts $94.67 from the expense invoice. Finally, Libas submitted a supplemental declaration on December 22, 2000, claiming that additional fees for expert witness Mary Jane Leland had been omitted from the original claim for expenses. The amount claimed is $9,563. The Court will grant Libas's petition for the additional fees attributable to Leland. However, because it is not clear if the amount claimed on the supplemental declaration includes previous claims for Leland's services, and to avoid double-counting Leland's fees, the Court will subtract the $2308.35 claimed for Leland's services in the original invoice. Therefore, while all other expenses remain valid, the Court denies additional fees for charges of Federal Express and messenger services, the three discussed meals, the hotel stay, expenses incurred prior to December 30, 1994, and overlapping witness fees for Leland.

IV. CONCLUSION

Based on the previous evidence regarding attorneys' fees and expenses, the total awarded to Libas is $199,723.87.

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